(21,811.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 124.

THE CUBA RAILROAD COMPANY, PETITIONER,

vs.

WALTER E. CROSBY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 11, 1911.

a File No. 1134.

Transcript of Record.

United States Circuit Court of Appeals for the Third Circuit, October Term, 1908.

No. —.

CUBA RAILROAD COMPANY, a Corporation Organized under and by Virtue of the Laws of the State of New Jersey, Defendant-Plaintiff in Error,

vs.

WALTER E. CROSBY, a Citizen of the State of Tennessee, in the United States of America, Plaintiff-Defendant in Error.

In Error to the Circuit Court of the United States for the District of New Jersey.

Filed June 24, 1908.

1 United States Circuit Court, District of New Jersey.

In Tort.

S. T., 1906. No. 41.

WALTER E. CROSBY
vs.
CUBA RAILROAD COMPANY.

Copy of Docket Entries.

1906, December 6. Summons issued returnable December 18, 1906.
1906, December 10. Summons and Declaration returned, served and filed.
1906, December 26. Order extending time to plead filed.
1907, January 21. Proof of service of notice to file security for costs filed.
1907, March 1. Bond for security for costs filed.
1907, March 5. Plea filed.
1907, March 11. Proof of Service of Notice of Application for appointment of commissioners filed.
1907, March 11. Letter consenting to appointment of commissioners filed.
1907, March 11. Order specially appointing commissioners to take testimony and fixing number of days notice filed.

1907, May 9. Order for commission filed.
1907, May 9. Commission issued and delivered to Attorney for defendant.
1907, May 27. Commission returned executed and filed.
1907, September 7. Notice of Trial filed.
1907, November 8. Trial. Verdict "Guilty." Damages $6000.00.
1907, November 12. Rule to show cause why new trial should not be granted filed.
1907, November 21. Rule extending time for return of rule to show cause filed.
1907, December 2. Hearing on rule to show cause. Decision reserved.
2 1907, December 2. Reasons for new trial filed.
1907, December 2. Notice of motion to dismiss filed.
1907, December 2. Affidavit of service filed.
1908, January 2. Opinion filed.
1908, March 16. Rule to take testimony filed.
1908, April 18. Hearing before Court as to citizenship of plaintiff.
1908, April 18. Order amending declaration and for leave to enter judgment filed.
1908, April 18. Rule for judgment final filed.
1908, April 18. Plaintiff's costs taxed at $43.30 and filed.
1908, May 11. Assignment of Errors, Petition for Writ of Error, Order for Writ of Error and Bond filed. Bill of Exceptions filed.
1908, May 11. Writ of Error issued. Copy filed.
1908, May 11. Citation issued.
1908, May 13. Citation filed.

United States Circuit Court, District of New Jersey.

In Tort.

WALTER E. CROSBY
vs.
CUBA RAILROAD COMPANY.

Judgment.

1908, April 18.—Judgment for plaintiff for six thousand forty-three dollars and thirty cents.

Damages	$6,000.00
Costs	43.30
	$6,043.30

Judgment signed.

W. M. LANNING, *Judge.*

3 United States Circuit Court for the District of New Jersey.

The Eighteenth Day of December as Yet of the September Term, in the Year of Our Lord Nineteen Hundred and Six.

DISTRICT OF NEW JERSEY, *ss:*

Cuba Railroad Company, a corporation, organized under and by virtue of the laws of the State of New Jersey, the defendant in this suit, was summoned to answer unto Walter E. Crosby, resident of the City of Dickson, in the State of Tennessee, the plaintiff therein, in an action in tort, and thereupon the said plaintiff by Benjamin M. Weinberg, his attorney, complains. For that whereas the said defendant before and at the time of committing the grievances hereinafter mentioned was engaged in operating and conducting a planing mill at Camaguey, in the Republic of Cuba, and while being so engaged, had the possession, use, control and management of a certain stationary engine which was run and operated by steam power, and had also then and there the possession, use, control and management of certain overhead iron pulleys and shafting which were connected with, and operated by said stationary engine.

And the said plaintiff avers that it thereby became and was the duty of the said defendant to use due and reasonable care to provide, keep and maintain the said stationary engine in a safe, suitable and proper condition and to use due and reasonable care to provide, keep and maintain safe, suitable and adequate pulleys and shafting overhead, which were connected with and operated by said engine, so as not to endanger the lives and limbs of those of its employees who were compelled, in the performance of their duties, by the said defendant, to work in said mill near to and about said engine, pulleys and shafting.

Yet the defendant, not regarding its duty in that behalf, did not use due and reasonable care to provide, keep and maintain the said stationary engine in a safe, suitable and proper condition, and did not use due and reasonable care to provide, keep and maintain safe, suitable and adequate pulleys and shafting overhead which were connected with and operated by said engine, so as not to endanger the lives and limbs of those of its employees who were compelled to work in said mill by said defendant as aforesaid, near to and about said engine, pulleys and shafting, but wholly failed and neglected so to do.

And the plaintiff avers that on the sixteenth day of June, nineteen hundred and six, at said Camaguey, in Cuba aforesaid, he was employed by the said defendant to work in and about its said mill, and near to and around the said engine, pulleys and shafting.

4 And the plaintiff avers that while he was so employed as aforesaid, the said engine, being in an imperfect and defective condition, of which imperfect and defective condition the said defendant then and there had due notice and knowledge, but of which said condition the said plaintiff had no notice or knowledge, became unmanageable and began to "race" or "run away," thereby then

and there placing a severe strain upon the said pulleys and shafting, which said pulleys being weak, unsuitable and inadequate to stand the strain so put upon them, of which weak and unsuitable condition the said defendant also then and there had due notice and knowledge, but of which said condition the said plaintiff had no notice or knowledge, broke and flew apart, whereby one of the pieces or parts of said pulleys which was made of iron, struck the said plaintiff in his hand, and injured it so badly that it had to be amputated above his wrist, in order to save the said plaintiff's life. And the said plaintiff was thereby otherwise painfully and permanently bruised, wounded and injured.

And also by means of the premises, the plaintiff became and was sick, sore, lame and disordered and so remained and continued for a long space of time, to wit, from thence hitherto, during all which time the said plaintiff suffered and underwent great pain, and in the future will suffer and undergo great pain and was hindered and prevented and in the future will be hindered and prevented from transacting and attending to his necessary and lawful affairs by him during all that time to be performed and transacted; and lost and was deprived of and in the future will lose and be deprived of divers great gains, profits and advantages which he might and otherwise would have derived and acquired, and thereby also the said plaintiff was forced and obliged to lay out and expend divers large sums of moneys amounting in all to the sum of five hundred dollars in and about endeavoring to be cured of the wounds, bruises and injuries so received as aforesaid to wit, at Camaguey, in the Republic of Cuba, to wit, at Trenton in the District of New Jersey aforesaid.

And whereas also heretofore to wit, on the sixteenth day of June, nineteen hundred and six, the said defendant was engaged in operating a certain other planing mill at Camaguey, in the Republic of Cuba, and while being so engaged had the possession, use, control and management of a certain other stationary engine which was run by steam power, and had also then and there the possession, use, control and management of certain other overhead iron pulleys and shafting which were connected with and operated by said other stationary engine.

And the plaintiff avers, that it required the constant attention and services of a practical and experienced engineer to properly run and attend the said other stationary engine, so as to prevent its becoming unmanageable and "racing" or "running away" and endangering the lives and limbs of those employees of the said defendant who were obliged to work in said other mill and near to and about the said engine, shafting and pulleys.

And the plaintiff avers that it thereby became and was the duty of the said defendant to use due and reasonable care to employ, engage and maintain a practical and experienced engineer to run and attend to the said other engine as aforesaid, so as to prevent its becoming unmanageable and "racing" or "running away" and endangering the lives and limbs of those employees of the said defendant who were obliged to work in said other mill and near to and about said engine, shafting and pulleys.

Yet the said defendant not regarding its duty in that behalf did not use due and reasonable care to employ, engage and maintain a practical and experienced engineer to run and attend to the said other engine as aforesaid so as to prevent its becoming unmanageable and "racing" or "running away" and endangering the lives and limbs of those employees of the said defendant who were obliged to work in said other mill and near to and about said engine, shafting and pulleys, but wholly failed and neglected so to do.

And the said plaintiff avers that on the day and year aforesaid, the said defendant employed a man named Bonet, known to the said defendant to be incompetent, inexperienced and wholly incapable of caring for and attending to said engine, to take charge of said engine and to run, look after and care for the same, but the said Bonet being inexperienced, incompetent and incapable of caring for and attending to said engine as aforesaid, permitted the said engine to be and become unmanageable and to "race" or "run away," thus causing a severe strain to be placed upon the said pulleys, which then and there broke, whereby one of the pieces or parts of said pulleys struck the said plaintiff in his hand and injured it so badly that it had to be amputated above his wrist, in order to save the said plaintiff's life, and the said plaintiff was thereby otherwise painfully and permanently bruised, wounded and injured. And also by means of the premises, the plaintiff became and was sick, sore, lame and disordered and so remained and continued for a long space of time, to wit, from thence hitherto, during all which time the said plaintiff suffered and underwent great pain, and in the future will suffer and undergo great pain and was hindered and prevented and in the future will be hindered and prevented from transacting and attending to his necessary and lawful affairs by him during all that time to be performed and transacted, and lost and was deprived of and in the future will lose and be deprived of divers great gains, profits and advantages which he might and otherwise would have derived and acquired, and thereby also the said plaintiff was forced
6 and obliged to lay out and expend divers large sums of money amounting in all to the sum of five hundred dollars in and about endeavoring to be cured of the wounds, bruises and injuries so received as aforesaid, to wit, at Camaguey, in the Republic of Cuba, to wit, at Trenton in the District of New Jersey aforesaid. To the damage of the said plaintiff twenty thousand dollars and therefore he brings his suit, etc.

BENJAMIN M. WEINBERG,
Attorney for Plaintiff.

Endorsed: United States Circuit Court for the District of New Jersey. Walter E. Crosby, Plaintiff, vs. Cuba Railroad Company, a corporation, Defendant. Summons and Declaration. In Tort. To the Defendant: Take notice that unless you appear and file a plea or demurrer to the within declaration within twenty days from the date of service hereof upon you, judgment by default will be entered against you. Benjamin M. Weinberg, Attorney of Plaintiff. Benjamin M. Weinberg, 738 Broad Street, Newark, N. J. Filed December 10, 1906. H. D. Oliphant, Clerk.

United States Circuit Court, District of New Jersey.

In Tort.

WALTER E. CROSBY
vs.
CUBA RAILROAD COMPANY.

And the said defendant by Samuel D. Oliphant, Jr., its attorney, comes and defends the wrong and injury, when, etc., and says, that it is not guilty of the said and supposed grievances above laid to its charge, or any or either of them, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against it. And of this the said defendant puts itself upon the country, etc.

S. D. OLIPHANT, JR.,
Attorney for Defendant.

STATE OF NEW JERSEY,
County of Mercer, ss:

Samuel D. Oliphant, Jr., being duly sworn according to law, upon his oath says that he is attorney of the defendant in the above
7 entitled cause; that the above plea is not intended for the purpose of delay, and that affiant believes that the defendant has a just and legal defence to the action on the merits of the case; that the officers of the defendant company are absent from and not resident in the district of New Jersey.

S. D. OLLIPHANT, JR.

Sworn to and subscribed before me this 5th day of March, 1907.

WALTON M. WATSON,
Notary Public, N. J.

Endorsed: United States Circuit Court, District of New Jersey. Walter E. Crosby, Plaintiff, vs. Cuba Railroad Company, Defendant. Plea. S. D. Oliphant, Jr., Attorney. Filed March 5, 1907. H. D. Oliphant, Clerk.

United States Circuit Court, District of New Jersey.

In Tort.

WALTER E. CROSBY
vs.
CUBA RAILROAD COMPANY.

Be it remembered that on the eighth day of November, nineteen hundred and seven, at a Circuit Court of the United States, in the Third Circuit, in and for the District of New Jersey, before the Honorable William M. Lanning, a Judge of said court, the issues

joined in the above stated cause between the said parties (pro ut the pleadings) came on to be tried by a jury for that purpose duly empaneled, and thereupon the following proceedings were had.

Appearances:

Benjamin M. Weinberg and Samuel Kalisch, Esqrs., Counsel for Plaintiff,

Henry De Forest Baldwin, Esq., of Lord, Day & Lord, Counsel for Defendant.

Transcript of Testimony, Taken at Trenton, N. J., on November 8, 1907, *at the Federal Building.*

8 WALTER E. CROSBY, Plaintiff, called and sworn in his own behalf.

Direct examination.

By Mr. WEINBERG:

Q. Mr. Crosby, you are the plaintiff in this case?
A. Yes, sir.
Q. Where do you live?
A. I live at present in Cuba.
Q. Whereabouts in Cuba?
A. Bardo, Cuba.
Q. How long have you been there?
A. About three months.
Q. Did you ever work in Camaguey, Cuba?
A. Yes, sir.
Q. For whom?
A. I worked there for the Cuba Railroad Company.
Q. What was the Cuba Railroad Company?
A. A railroad doing business in Cuba,—a railroad business in Cuba.
Q. At Camaguey, what did they have?
A. Car shops and general shops and a planing mill and mechanical department.
Q. When did you go to work for them?
A. The first of September, 1905.
Q. Around the 1st of September, 1905?
A. Yes, sir.
Q. And what were your duties there, first duties?
A. My first duties, I was working there as a machinist, or a man uncrating and unpacking.
Q. How long did you work at that?
A. About two weeks.
Q. Who employed you?
A. In the first place I was employed by the foreman of the shop, a Mr. Wolff, at that time.
Q. Where were you working before you went to Camaguey?
A. I was at Jackson, Tennessee, before I went to Cuba.

Q. And were you employed there?
A. Yes, sir.
Q. What was the nature of the work?
A. I always worked in a planing mill—on planing-mill machinery.
9 Q. What were your duties in that planing mill?
A. Saw filing; a saw-filer.
Q. How long did you carry on that occupation?
A. In Jackson, some six or seven years.
Q. Is that your main work?
A. That is my work, saw-filer.
Q. How old are you?
A. Thirty years old.
Q. Now, among the machinery that was received and uncrated, did, or do you know anything about an engine during that time?
A. There was no new engine that came; there was an old engine run in out of the yard somewhere. I don't know where it came from; they brought it in the shop and it was set up in our place, about the centre of the shop.
Q. Give us some idea of this shop; how large was it?
A. I think it was 80 feet long in the main part, and I believe 60 feet wide, and an addition on one end for the filing room, and on the far corner, a boiler room.
Q. Now, with reference to this shop, where was the engine placed?
A. Pretty well in the centre of the main building.
Q. After you finished your work uncrating, what was your next occupation?
A. I was put in charge of the shop, and the men of the shop, the boss of the wood-working department.
Q. What were they doing?
A. Finishing setting up the machine and getting out material for the cars, and repairing freight cars.
Q. What were your duties there?
A. Saw-filing, and I had charge of the men in the shop.
Q. Charge of what men?
A. The men around the wood-working machinery.
Q. How far away was that from where this engine was set up?
A. I suppose about 70 or 75 feet.

By the COURT:

Q. How far was that department from where this engine was placed that you speak of?
A. The wood-working department was all around the engine; the engine was pretty well in the centre of the shop, but my particular work of saw-filing was probably 75 feet.

Further direct:

10 Q. Now, where were the men you had charge of; where were they located with respect to the engine?
A. In fact all around.
Q. Now, what did you have to do with this engine?

A. I generally started and stopped the engine, that is, I started it in the morning, when we got ready to start the machine and stopped it at noon, and started it again after dinner, and stopped it at night.

Q. How long had you been doing that work in regard to the engine?

A. Only probably about a month or two, that I had started and stopped the engine before the accident.

Q. Who looked after the engine?

A. The engine was in charge of the mechanical department; when anything got wrong we sent for a machinist to look after it.

Q. Who looked after the engine then?

A. Mr. Bonnett.

Q. Who was Mr. Bonnett?

A. He was hired there as fireman and engineer, to look after the engine,—he oiled the engine and did the firing and looked after the boiler.

Q. Was there a regular engineer or not, in charge of the engine?

A. No, I think not; there was no engineer except Mr. Bonnett.

Q. Are you an engineer?

A. No, sir.

Q. You never have been licensed as an engineer?

A. No, sir.

Q. Do you know what the governor of an engine is?

A. Yes, sir; I know the duties of the governor.

Q. Do you know the functions of the governor?

A. The governor of a stationary engine is to regulate the amount of steam that goes into the cylinder of the engine; it regulates the power of the engine, and if you let on more it opens automatically and gives the engine more steam. It holds the speed in relation to the revolutions a minute.

Q. Now, if the governor of the engine does not work, what happens to the engine?

A. It generally runs away or runs too fast.

Q. Tell us what you mean by running away?

A. I mean an extraordinary amount of steam turned in the engine makes the engine run at a tremendous speed.

11 Q. Now, can you tell us what the effect of running an engine at high speed has on the overhead pulleys?

Mr. BALDWIN: I submit that he is not competent to answer that question.

Question withdrawn.

Q. Do you know what effect upon the pulleys is of an engine when it is running away?

Mr. BALDWIN: I object.

Q. Answer that question yes, or no, simply.

A. Yes, sir.

Q. Will you state what that effect is?

Mr. BALDWIN: I object to that on the ground that he is not an expert, and is not qualified to testify on that point.

The COURT: That is a good objection; witness has not shown competency to speak as an expert; he has not qualified as an expert.
Mr. WEINBERG: I pray an exception.
Exception allowed for plaintiff and sealed accordingly.

Q. Have you gathered any knowledge from experience or otherwise, as to the effect which the running away of an engine would have upon pulleys connected with the engine? Answer it yes, or no.
A. Yes.
Q. What experience have you had, or other knowledge?
A. Well, I have seen pulleys burst from running too fast,—from overspeed; I know there is a limit to the force or speed of an engine.

Mr. BALDWIN: I object to that as incompetent.

By the COURT:

Q. Where have you had opportunities to make observations as to the effect of an engine running away; did you have any such opportunities in Cuba, at the place where you were working?
A. No; I never saw any accident with severe results.
Q. Did you see the effects of that engine running away there, that engine that was in this shop, before the time of the accident?
A. Not any severe effects.
Q. Had you previous to that time seen any effects from the running away of an engine, in any other place?
A. Well, yes, sir.

Further direct:

Q. How often?
A. Some two or three times.
Q. From those two or three times, how do you know that
12 the running away of an engine would have any effect on pulleys? Is there any way that you could observe whether it was connected with the running away of the engine as to the effect on the pulleys?

The COURT: Do you really think you need any expert evidence on that point? Every man on the jury knows, and we all know that when an engine is running at an improper speed, a high speed, that the tendency is to shake it from the foundation up, and of course, to effect anything that it may be connected to, such as belts, pulleys or gearing of any kind.
Mr. BALDWIN: I don't think the witness is qualified as an expert.
The COURT: We all agree on that, and I sustain your objection.

Further direct:

Q. What did you ever observe in regard to this engine and governor, after you were employed working in this saw-filing department, after you were working as a regular employé there?

Mr. BALDWIN: Objected to.

Q. After you were engaged in your usual duties there, whatever they might have been, what did you notice about the engine, and

particularly with reference to the governor connected with it, if anything?

A. I noticed that the governor failed to work properly and when the engine was started it failed to work properly sometimes, and then when it started it would run too fast.

Q. And when was that, the first time?

A. Pretty soon after I took charge there, probably three or four weeks.

Q. And what did you do at that time with regard to it?

A. I notified Mr. Coombs.

Q. What were Mr. Coombs' duties?

A. He had charge of the rolling-stock, or cars rather of the road, and was also superintendent of the shops.

Q. When you notified Mr. Coombs about this governor, what was done, if anything?

A. He notified Mr. Knight.

Q. What did you do, if anything further? What did you do besides Mr. Coombs about it, the first time?

A. I notified Mr. Coombs and told him to notify Mr. Knight, and that he was the master mechanic and that he would probably repair the engine.

Q. And you notified Mr. Knight?

A. Yes, sir.

Q. What were Mr. Knight's duties there?

13 A. He was known as the master mechanic and superintendent of the mechanical department.

Q. What were his duties there; what do you know that he did there?

A. He had to do with the mechanical department in that territory—the machines, and the locomotives and stationary engines.

Q. Now, as a result of notifying Mr. Knight and Mr. Coombs, was anything done to the engine at that time?

A. Yes, sir; he sent a machinist over there and he worked on the engine.

Q. Did you notice anything the matter with the engine after that?

A. Yes, sir; the same thing happened some three times before the accident.

Q. And were reports made, or not?

A. Yes, sir.

Q. To whom?

A. To Mr. Knight.

Q. By whom?

A. I reported it to Mr. Knight.

Q. What did you report?

A. I reported that the governor was not working properly.

Q. Did you explain in what particulars at all?

A. Yes, sir; I told him that it allowed the engine to run too fast at times and failed to check the speed, when it had attained proper speed.

Q. Now, the last time that it was out of order, what was the

matter with it then,—I mean the engine and governor before the accident, Mr. Crosby?

A. Why, the last time before the accident that I noticed anything the matter, was on Friday morning before the accident on Saturday.

Q. That was what day of the month and year,—when did the accident happen?

A. On the 16th of June was the accident.

Q. 1906?

A. 1906.

Q. And the last time that you noticed something was the matter, was Friday preceding, the day before?

A. Yes, sir.

Q. And what was the matter at that time?

14 A. The governor seemed to fail to cut off the steam at the proper time.

Q. What was the result of that?

A. The result was the engine ran too fast, from racing.

Q. And as a result of that racing at that time, did you observe anything with the other operation of the machinery?

A. Nothing more than the vibration, and the dust flying and that it was running too fast, you know.

Q. Now, this Friday when you noticed something the matter with the governor, what did you do?

A. I notified Mr. Knight that the governor was not working right.

By the COURT:

Q. How many times before that, had you notified Mr. Knight that it was not working properly?

A. Three times before that.

Q. And during what length of time?

A. I cannot state just exactly, but I should say it was during six or seven months.

Further direct:

Q. And on these different occasions, what was done,—now on the other two occasions before the Friday, as the result of your communication with Mr. Knight; what was done with the engine, anything or not?

A. Each time I reported, they sent a machinist over there and he worked on the engine.

Q. And after that how did the engine work?

A. It seemed to work better for a time.

Q. Now, come down to Friday, this Friday after you noticed something the matter with the engine,—you say you notified Mr. Knight; what did you tell Mr. Knight?

A. I told Mr. Knight that the governor was not working properly and I was afraid it would cause trouble and an accident and the shafting and pulleys would not stand from the speed it was running, I was afraid.

Q. And what reply did you get to that, if any?

A. He said he thought there was no danger; that the governor was worn out, and that they would replace it with a new governor.

By the COURT:

Q. Tell us all that you said to Mr. Knight and that he said to you, on this Friday, the day before the accident,—where did you find him in the first place?

15 A. I found him over in the engine house at 9 o'clock or 10 o'clock in the forenoon.

Q. How long had the engine been running that morning?

A. Probably an hour or one and a half hours.

Q. It didn't start to run away until after you notified Mr. Knight?

A. The difficulty that I noticed was in starting the engine that morning.

Q. And about 9 o'clock you called Mr. Knight's attention to it, after finding him in the engine-house?

A. Yes, sir.

Q. Tell us all that you said to him and he to you, as near as you can recall it.

A. Well, I told him that the governor was not working right, this morning again; and I was afraid that it would cause trouble or an accident, and that the shafting and pulleys would not stand the speed, when it was turned loose that way, and he said that the governor was worn out, and he would have it thoroughly overhauled or replace it with a new one as soon as possible; that the governor would have to do until they could do that, or had time to repair it; he told me to go on and do the work, that he didn't think there was any danger, and that he thought the pulleys and shafting would stand until they replaced the governor.

Q. Go ahead, tell us the whole story; was there anything further?

A. No, sir; I think that was all.

Q. What did you do then?

A. I went back to my work.

Further direct:

Q. You went back to your work?

A. Yes, sir.

Q. Now, on Friday or Saturday, what time did you start? On Saturday when you went to work, did you start the engine then?

A. Yes, sir; I started it on Saturday morning.

Q. About what time?

A. Between 7 and 8 o'clock in the morning.

Q. Did you stop it at noon time?

A. Yes.

Q. Did you work Saturdays there?

A. We worked Saturday until four o'clock.

Q. What time did you start the engine after your dinner?

A. About half past twelve.

16 Q. Do you know whether during the time the engine was stopped for lunch or dinner, whether anybody had worked at it during that time,—I mean in this half hour now?

A. No, I am not quite sure; they often did work at it.
Q. What time did you start this engine again after dinner?
A. I think about half past twelve.
Q. After it was started at half past twelve, what did you do; where did you go?
A. I was just outside of the shop unloading, or seeing to unload some logs on the cars and was part of the time out there and part of the time in the filing room.
Q. How long did you work that way; how long were you occupied that way?
A. Until the accident about two o'clock.
Q. About two o'clock what happened in there?
A. Well, the engine broke loose all at once and ran at a tremendous speed.
Q. Where were you at the time?
A. In the filing room.
Q. How far away from the engine?
A. Some 70 feet.
Q. Can you see the engine from there?
A. Yes, sir.
Q. Go ahead.
A. I saw the engine and saw that everything was running too fast, and I looked over and saw Mr. Bennet there by the engine, evidently trying to stop the engine.
Q. Did he stop it?
A. No, sir; he didn't seem to be able to stop it.
Q. What did you do?
A. I ran over to see if I could stop it and to see what the trouble was.
Q. What did you do?
A. Just as I got to the engine, the pulleys overhead burst and a piece of one of the pulleys struck me on the hand.
Q. Which hand?
A. The right hand; and I went out of the shop at that time, or soon afterwards and stopped there until the pieces stopped flying, and then I went on out of the shop.
Q. You said that one of the pieces struck you; struck you where?
A. Struck me on the right hand.
17 Q. And what happened to your right hand when one of the pieces struck it?
A. It crushed the hand,—practically tore the hand all to pieces.
Q. What made the engine run away at that time when you saw it?
A. Well, it was because the governor did not work properly; it was the governor.
Q. Now, after the accident, what did you do after you went out of the shop,—did you go anywhere for medical attention?
A. Yes, I went right down to the hospital.
Q. How long were you in the hospital?
A. I was in the hospital a little over 24 hours.
Q. And then where did you go then?
A. I went to Dr. Harrison's office.

Q. And what was done for you up there?
A. They dressed my hand a time or two and on Tuesday following they amputated it,—Tuesday following the accident.
Q. How long was it before you were cured of the wound made by the amputation?
A. It was some four or five weeks before it was healed up.
Q. And the time of the accident, what were you earning?
A. $125 a month.
Q. And how long had you been earning that.
A. About three months, I think.
Q. How soon after that accident, were you able to go to work or do anything—any kind of work?
A. Well, I was out again and around the shop three weeks after the accident—the same shop.
Q. And what work did you do there?
A. I didn't do but very little work after that, but I was around there seeing after things the best I could.
Q. What were you paid after you went back to work?
A. The same wages.
Q. Did they pay you the same wages for the time you were laid up?
A. Yes, sir.
Q. And then you lost no wages?
A. No wages during the time I was laid up.
Q. When did you leave them again after that?
A. I quit in about two months after the accident.
18 Q. What did you do then, and what occupation did you follow?
A. I didn't follow any particular occupation at the time, that is, I worked merely around home; tinkering around home.
Q. Did you leave or were you discharged?
A. I left there.
Q. Why?
A. Well, I considered the place unsafe to work in for one reason.
Q. What is your occupation now, Mr. Crosby?
A. Well, I am still working as a wood-working machinist.
Q. With some company?
A. No; I am working with my father at present.
Q. You are not employed at a regular salary?
A. No, sir.
Q. Tell us whether the loss of your hand interferes with your regular trade.
A. Yes; it has knocked me out pretty well.
Q. In the trade you follow is it necessary to use both hands?
A. Yes, sir.
Q. Can you follow your trade of saw filer, with your one hand?
A. No, sir.
Q. Were there any expenses of the taking off of your hand—doctor's bills or anything of that sort?
A. There was a doctor's bill, but the railroad company settled the bills.
Q. Are you married or single?

A. Married.
Q. Your family live where?
A. Bardo, Cuba.

Cross-examination.

By Mr. BALDWIN:

Q. Who employed you, Mr. Crosby, for the Cuba Railroad Company?
A. In the first place, Mr. Wolff.
Q. Who was Mr. Wolff?
A. Mr. Wolff was a machine man, who went down there to set up the machinery.
Q. Well, how did you come to know him?
A. Well, I met him there soon after he went there, and he told me his business.
19 Q. Didn't Mr. Coombs employ you; didn't you get your place with the Cuba Railroad Company that way?
A. In the first place I got it through Mr. Wolff and then I was placed in the shop by Mr. Coombs.
Q. What were Mr. Wolff's duties?
A. They were the same as mine, so after I was placed in charge he had charge of the setting up of the machinery.
Q. Was the plant in operation during Mr. Wolff's time?
A. No, sir.
Q. Then he didn't have charge of the operations, but merely installed the machinery and you were there to help him install machinery?
A. Yes, sir.
Q. Now, Mr. Wolff left for some reason or other and you succeeded him?
A. Yes, sir.
Q. And who put you in that position?
A. Mr. Coombs.
Q. Had Mr. Coombs asked you any questions as to your qualifications for that place?
A. Why, he asked me something about the experience I had on wood-working machinery.
Q. You had worked for some people in Camaguey?
A. Yes, sir.
Q. And they spoke well of you?
A. I think so.
Q. And what did you do for them?
A. I went to saw-filing.
Q. Did you do anything besides filing saws?
A. Yes, sir; I worked around some of the machines some.
Q. What salary did you get from them?
A. I didn't draw any regular salary; I worked by the day, so much a day, and then I got commission of so much a thousand feet.
Q. So much a thousand feet?
A. What lumber went through the saw mill.
Q. That is you were paid according to the amount of lumber?

A. I was paid two and a half a day and so much a thousand.
Q. Then you had charge of their shop, didn't you?
A. Well, no, sir, I had no charge of the shop.
Q. You were the only one paid for the amount of lumber turned out of the shop weren't you?
20 A. I am not sure about that. I think they had other men paid the same way.
Q. Did you tell the company you had been in charge of a saw-mill before you came down to Camaguey?
A. No, sir.
Q. You were put in charge of this mill by the Cuba Railroad Company, were you not?
A. Well, I suppose you would call it being put in charge, I had to hire the men and saw-filers.
Q. You gave the orders to the men in the saw-mill?
A. Yes, sir, I got my orders from Mr. Coombs.
Q. Did you tell the men in the shop what they were to do?
A. Yes, sir, I set the men to work.
Q. And did you have full authority to set one man to do one thing and another man to do another thing?
A. Well, I handed my orders down as I was told by Mr. Coombs what work was to be got out and then I went ahead.
Q. You arranged the men as you thought best?
A. If it was left to me, I did.
Q. Of course, if he interfered with you, that was different, but ordinarily you told the men what to do in pursuing their work.
A. Yes, sir, some I did and sometimes Mr. Coombs was around there and attended to it himself.
Q. Now, are there licensed engineers in Cuba?

Mr. WEINBERG: Objected to as not cross-examination and not material.

Q. Did you have under you any men who were engineers?
A. No, sir; not that I know of. They were not licensed engineers at all.
Q. Was there a man named Kyle in your saw-mill?
A. Yes, sir.
Q. Was he an engineer?
A. Not that I know of, he was working there as a machine man or operator, not an engineer.
Q. He did occasionally work an engine?
A. No, sir; not that I know of.
Q. You could have told him to, if you wanted to?

Mr. WEINBERG: That is objected to.
Mr. BALDWIN: Question withdrawn.

Q. Did Bonet do anything about the engine except clean it?
21 A. He had sometimes stopped and started the engine; he would oil and clean the engine.
Q. He did ordinarily work as a fireman?
A. Yes, he was a fireman.

Q. Did you ever see Mr. Bonet clean the engine when it was in motion?

Mr. WEINBERG: I don't see how that is material.

The COURT: What is the purpose of that?

Mr. BALDWIN: I want to see whether he had in fact, and perhaps that was the cause of the accident.

The COURT: I don't see how it could possibly be so. The theory of this case is based upon the alleged negligence of the defendant company and this man was in charge of the shop and he knew that his engine was working defectively, according to his own statement, he says that it had run away 3 or 4 times, in a period of 6 or 7 months, and ran away the day before the accident, Friday morning, and that he reported to Mr. Knight, the mechanical expert or superintendent. The accident happened the next day, he says, in the same way, by the engine running away, and he says furthermore that on Friday morning, he reported to Mr. Knight that he was afraid there would be an accident. Now there was an obvious risk to him and he knew it, there is no doubt, but he says that on Friday morning when he reported to Mr. Knight, Mr. Knight said, I don't think there is any danger in operating that machine; that the governor was worn out and a new one ought to be substituted, but you go back to your work and we will have it put in.

Q. If the governor was dirty it would affect its working properly, wouldn't it, Mr. Crosby?

A. Well, I don't know that I would say that the governor was dirty, but what it would work properly.

Q. Wasn't that the matter with the governor before, when you say that it didn't work properly, wasn't the trouble with it, that it was dirty?

A. That I don't know.

Q. Now, at the time of this accident, were you not talking with Mr. Coombs within a few feet of the engine?

A. Mr. Coombs and I were in the filing room at the time.

Q. And could you see the engine from where you were?

A. Yes, sir.

Q. And the filing room was not shut off?

A. No, sir.

Q. It was all in the same shop?

A. I could see the whole shop from where I was; I didn't
22 see Mr. Bonet just before the accident; I didn't see him until my attention was called that way from the engine's not working properly.

Q. When you heard it going so rapidly?

A. Yes, sir.

Q. Are you sure that Mr. Knight was in Camaguey the day before this accident?

A. Yes, sir.

Q. Quite sure of that, are you?

A. Yes, sir; I think Mr. Knight was at the shop the day before the accident.

Q. You frequently spoke to his subordinate about the machinery in the mill, when any small repairs were needed?
A. When some small repairs were required.
Q. Either to him or his assistant,—who was Mr. Knight's assistant?
A. I don't believe I can recall the man's name at present.
Q. It was not Mr. Coombs?
A. No, sir.
Q. *Rgar* was a different department?
A. A different department.
Q. And your orders were to either speak to Mr. Knight or his assistant, if anything was the matter with that machinery?
A. Yes, sir.
Q. And you reported it promptly?
A. Yes, sir.
Q. Are you now entirely sure that the conversation that you spoke of having with Mr. Knight, was that which you had with him on Friday morning?
A. Yes, sir, I think it was Mr. Knight.
Q. You were in a perfectly safe place, so far as not being liable to any danger from this accident, when you saw the engine going fast, were you not?
A. No, sir; I don't think so; I don't think anybody could be in a safe place that night.
Q. You said you were 70 feet away?
A. Yes, sir.
Q. And you immediately rushed to the engine?
A. Yes, sir.
Q. You knew it was a dangerous thing to do?
A. I knew it was dangerous—in reach of danger.
Q. You said you were afraid of continuing to work in the
23 shop, as one of the reasons why you left the Cuba Railroad Company's employ; did you tell anybody that at the time?
A. I am not just sure about that.
Q. You had a conversation with Mr. Caldos and Mr. Coombs, with respect to continuing, or with respect to your employment with the company?
A. I went to see Mr. Caldos.
Q. And the matter of continuing your employment was discussed, was it not?
A. Yes, sir.
Q. And did you say to Mr. Caldos or Mr. Coombs that you thought it was an unsafe place to work?
A. No, sir, I don't remember that I did.
Q. Now they paid you during all the time you were laid up?
A. Yes, sir.
Q. And up to the time you left their employ?
A. Yes, sir.
Q. Did anybody in the shop get any more wages than you did, except Mr. Coombs?

Mr. WEINBERG: Objected to as immaterial.

The COURT: Objection sustained.

Q. Was Mr. Bonet employed at your request?
A. No, sir.
Q. Didn't you ask Mr. Knight to leave him there when Mr. Knight was going to take him away?
A. No, sir; I didn't know Mr. Knight was ever going to take him away.
Q. You had a man there before Mr. Bonet came there?
A. Yes, sir.
Q. And didn't you complain of that man and wasn't he removed from his position, because you didn't like him?
A. Yes, sir.
Q. And didn't they then give you Mr. Bonet?
A. Yes, sir.
Q. And then didn't they suggest that they take Bonet away later?
A. I don't remember of it.
Q. And don't you remember asking that Mr. Bonet be left there?
A. No, sir.

Plaintiff rests.

24 Mr. BALDWIN: I move to dismiss the complaint, on the grounds:

I. That the plaintiff has not shown any negligence on the part of the defendant, either in the maintenance of its machinery, or in the selection of its servants.

II. On the ground that the defendant showed no negligence in retaining Mr. Bonet, a fireman to assist the plaintiff, inasmuch as he was engaged and retained at the plaintiff's request.

III. On the ground that the plaintiff cannot recover by reason of his contributory negligence, for it was the duty of the plaintiff to look after the engine, and if the same was out of order, it was his duty to have it repaired. His failure to do so constituted negligence.

IV. That the plaintiff cannot recover by reason of his contributory negligence, for if the fireman Bonet was incompetent, it was his duty to have him discharged, and his retention as an incompetent fireman, constitutes contributory negligence.

Then I also move to dismiss on the ground that the Court has not jurisdiction of the alleged cause of action, because the alleged tort upon which this action is brought took place in Cuba as appears by the declaration and the plaintiff is not a resident of New Jersey, but is a resident of Cuba; and the defendant, while a New Jersey corporation, owns and operates a large plant in Cuba.

That the Court should not take jurisdiction of this action for it is brought on a cause of action alleged to have arisen in Cuba, and there has been no allegation or proof that under the lex loci delecti the acts alleged gave this plaintiff no right of action against the defendant.

The Court should not take jurisdiction of the assumption that the common law prevails in Cuba, for Cuba has not been settled by

England or English Colonies, and there is no presumption that the common law prevails there.

The COURT: I will overrule the motion for a non-suit, not because I am absolutely certain about this point raised on the law of Cuba, I am not quite sure about that, but being in doubt, I ought not to grant a non-suit.

Mr. BALDWIN: Your Honor may entertain a motion later.

The COURT: Yes.

Mr. Baldwin Opened for the Defense.

Recess until 2 P. M.

25 After Recess.

Mr. KALISCH: If the Court please, we have had a conference with the plaintiff in this case, and in consideration of the fact that the Court announced before recess that this case would result in mistrial, and would be put off for a term, and as the plaintiff is not in a position to go to any expense, and is now here from Cuba, he feels that he would rather waive all objections to the admission of this testimony of the defendant and have his case disposed of now instead of later.

The COURT: Let the depositions be read.

Mr. Baldwin read depositions of Wiliam E. Knight, Jose Bonet y Riera, Joan Garcia y Arduin and Samuel W. Coombs, taken in Cuba.

The COURT: Mr. Baldwin, as you read these questions it will be competent to make objections.

The President of the United States of America to Jose Alvarez Gonzales, of Camaguey, Cuba, and J. F. Hanson, Consular Agent of the United States, Neuvitas, Cuba, Greeting:

Know ye, that we, in confidence of your prudence and fidelity, have appointed you, and by these presents do give unto you full power and authority, in pursuance of an order of the Circuit Court of the United States, for the District of New Jersey, made this day in a certain action pending between Walter E. Crosby, plaintiff, and Cuba Railroad Company, defendant, to take the testimony of witnesses who reside in Cuba; said testimony on the part of either party to said cause to be taken by you or either of you, upon not less than fifteen days' notice in writing by that party to the adverse party, his or its attorney or solicitor, of the time and place of such examination and of the names of the witnesses to be examined, such testimony to be taken, de bene esse, on oath or affirmation, administered according to the laws of the State of New Jersey, upon interrogatories to be then and there put by the parties, or either of them, or any person authorized in their behalf, such interrogatories and the answers thereto of each witness to be reduced to writing by you or one of you (according as both or one of you may take the testimony) and to be subscribed by deponent in your presence and thereupon the testimony so taken to be by you, or the one of you

who may take the same, certified, sealed up, endorsed, directed, and forwarded as is required in case of depositions taken under the 36th section of an act of the Legislature of the State of New Jersey, entitled "An Act on Evidence (Revision of 1900)," approved March 23, 1900.

26 Witness the Honorable Melville W. Fuller, Chief Justice of the United States, at Trenton, this Ninth day of May, Nineteen hundred and seven.

[SEAL.] H. D. OLIPHANT,
Clerk of the Circuit Court of the United States for the District of New Jersey.

Endorsed: United States District Court, District of New Jersey. Walter E. Crosby vs. Cuba Railroad Company. Commission.

Circuit Court of the United States, District of New Jersey.

WALTER E. CROSBY, Plaintiff,
against
CUBA RAILROAD COMPANY, Defendant.

REPUBLIC OF CUBA,
Province of Camaguey, ss:

I, Jose Alvarez Gonzalez, having heretofore been specially appointed Commissioner herein by an order herein dated the 11th day of March, 1907, and by virtue of a Commission herein issued to me the 9th day of May, 1907, do solemnly swear that I will faithfully, fairly and impartially take the testimony of the witnesses herein and perform my duties as such special Commissioner in accordance with the order of the Court to the best of my ability and understanding, so help me God.

JOSE ALVAREZ G.

Sworn to before me and signed in my presence this 18th day of May, 1907.

[L. S.] JOSE DE SOCARRAZ,
Abogaao y Notario Publico.

27 Circuit Court of the United States, District of New Jersey.

WALTER E. CROSBY, Plaintiff,
against
CUBA RAILROAD COMPANY, Defendant.

REPUBLIC OF CUBA,
Province of Camaguey, ss:

I. J. F. Hanson, having heretofore been specially appointed Commissioner herein by an order herein dated the 11th day of March, 1907, and by virtue of a Commission herein issued to me the 9th

day of May, 1907, do solemnly swear that I will faithfully, fairly and impartially take the testimony of the witnesses herein and perform my duties as such special Commissioner in accordance with the order of the Court to the best of my ability and understanding, so help me God.

JOHN F. HANSON,
American Consular Agent.

Sworn to before me and signed in my presence this 20th day of May, 1907.

JOSE ALVAREZ G.,
Notario Publico.

Circuit Court of the United States, District of New Jersey.

WALTER E. CROSBY, Plaintiff,
against
CUBA RAILROAD COMPANY, Defendant.

REPUBLIC OF CUBA,
Province of Camaguey, ss:

I, Isabel Beecher Albert, do solemnly swear to carefully, faithfully and impartially take the evidence of the witnesses
28 herein, taken herein in pursuance to an order of the United States Circuit Court, District of New Jersey, dated the eleventh day of March, 1907, and to make a true and correct transcript of said testimony, so help me God.

ISABEL BEECHER ALBERT.

Subscribed and sworn to before me, Jose Alvarez Gonzalez, the Commissioner herein by virtue of an order of the Circuit Court of the United States, District of New Jersey, dated March 11, 1907, and a commission issued thereon on the 9th day of May, 1907, this 20th day of May, 1907, as witness my hand and seal at Camaguey, Republic of Cuba.

JOSE ALVAREZ G.,
Notario Publico.

Subscribed and sworn to before me this 20th day of May, 1907.

JOHN F. HANSON,
American Consular Agent.

Circuit Court of the United States, District of New Jersey.

WALTER E. CROSBY, Plaintiff,
against
CUBA RAILROAD COMPANY, Defendant.

REPUBLIC OF CUBA,
Province of Camaguey, ss:

I, Alcides Betancourt, do solemnly swear to carefully, faithfully and impartially translate the evidence of the witnesses herein, taken herein in pursuance to an order of the United States Circuit Court, District of New Jersey, dated the 11th day of March, 1907, from Spanish into English and from English into Spanish, as may be required of me, so help me God.

ALCIDES BETANCOURT.

Subscribed and sworn to before me, Jose Alvarez Gonzalez, the Commissioner herein by virtue of an order of the Circuit Court of the United States, District of New Jersey, dated March 11,
29 1907, and a commission issued thereon on the 9th day of May, 1907, this 20th day of May, 1907, as witness my hand and seal at Camaguey, Republic of Cuba.

JOSE ALVAREZ G.,
Notary Public.

Subscribed and sworn to before me this 20th day of May, 1907.

JOHN F. HANSON,
American Consular Agent.

Circuit Court of the United States, District of New Jersey.

WALTER E. CROSBY, Plaintiff,
against
CUBA RAILROAD COMPANY, Defendant.

Present, at the office of Jose Alvarez Gonzalez, in the City of Camaguey, Republic of Cuba, on May 20, 1907, at 11 o'clock in the forenoon, the said Jose Alvarez Gonzalez, Commissioner herein, by virtue of an order of the United States Circuit Court, District of New Jersey, dated March 11, 1907, and a Commission issued thereon on May 9, 1907; Henry de Forest Baldwin, counsel for the defendant, no one appearing for the plaintiff.

In view of the unavoidable absence of Mr. J. F. Hanson, named also as commissioner in said order and commission, the proceedings were adjourned until 3 o'clock P. M.

Present at 3 o'clock P. M. on June 20, 1907, the said Jose Alvarez Gonzalez and John F. Hanson, Commissioners herein by virtue of the above mentioned order and commission, Henry de Forest Baldwin, counsel for defendant, no one appearing for the plaintiff.

A. A certified copy of the said order of said United States Circuit Court and the said commission were produced and the oaths of the said Commissioners, duly executed, were produced by them and attached thereto.

Isabel B. Albert was then duly sworn as stenographer and her oath, duly subscribed, was attached to said order and commission.

Alcides Betancourt was then duly sworn as interpreter and his oath, duly subscribed and executed, was attached to the said order and commission.

WILLIAM E. KNIGHT, a witness called on the part of the defendant, being duly sworn according to the laws of the State of New Jersey, was questioned by Henry de Forest Baldwin, and answered the questions as follows:

Q. What is your name?
A. William E. Knight.
Q. How old are you?
A. Thirty-six years.
Q. What is your profession?
A. Mechanical engineer.
Q. Are you a graduate of any institution or member of any professional bodies?
A. Yes, sir.
Q. If so, state them.
A. I am a graduate of the King's College, London; member of the Institute of Mechanical Engineers, England; also member of the Institute of Master Mechanics and Master Car Builders in the United States.
Q. What is your present position?
A. Superintendent of Motive Power of the Cuba Railroad Company.
Q. How long have you held this position? A. Since October 12, 1905.
Q. What professional positions had you previously held?
A. Previous to coming to the Cuba Railroad Company, I was for seven years Assistant Superintendent of Motive Power for the United Railways of Havana, and previous to that was for two years acting Superintendent of Motive Power on the Lagos Government Railway on the West Coast of Africa.
Q. What are your duties as Superintendent of Motive Power?
A. In addition to supervising all locomotive rolling stock, the supervision of all motive power of steam plants and machinery; and also the employment of engineers and firemen and the assigning them to their various duties.
Q. Are you acquainted with the saw-mill of the Cuba Railroad Company?
A. Yes, sir.
Q. State where it is and under whose charge it is.
A. It is one of the shops of the Cuba Railroad Company, situated among the Camaguey shops and is under the charge of Mr. Samuel W. Coombs, Master Car Builder.

Q. Is any machinery under your charge in this mill?

A. The machinery is under the charge of Mr. Samuel W. Coombs, with the exception of the boiler and the engine, which I run under my supervision.

31 Q. What was going on at the saw-mill when you became superintendent of Motive Power in October, 1905?

A. The new machinery was being installed.

Q. Who was installing the machinery there?

A. Mr. Crosby was in charge of the installation.

Q. Do you mean the plaintiff, by Mr. Crosby?

A. The plaintiff; yes, sir.

Q. Was there an engine and boiler there?

A. Yes, sir.

Q. Describe them.

A. The boiler was one which had been previously used in the saw-mill of the Cuba Railroad and was in good condition to perform all the work required. The engine was a new one which had been purchased for a certain purpose, but had not been used and was in perfectly new and good condition when it was installed and fully capable of performing all the work necessary.

Q. Was any complainant ever made to you about the engine?

A. I never received any complaint as regards the engine.

Q. Was any complaint ever made to anybody else about the engine?

A. No, sir.

Q. Were there ever any repairs reported to be made and not completed at the time of the accident in June, 1906?

A. All repairs that had been reported were effected directly after such report and there were no repairs incomplete at the time of the accident.

Q. When you said that there were no complaints about the engine I suppose there were various things required to be done and to do from time to time.

A. When I say there were no complaints, I mean to say that there was absolutely no complaint of a serious defect; that the only complaints, if they can be so called, were in the nature of reports of repairs needed, due to the natural wear of the engine, and these were always promptly effected.

Q. Did you give instructions to Mr. Crosby and your own subordinates with respect to reporting defects in the machinery?

A. Yes, sir.

Q. What were those instructions?

A. The instructions were that the engine and the boiler were to be carefully watched and any defects were to be immediately reported to myself or to the shop foreman during my absence.

32 Q. Did Crosby make reports to you with respect to the engine and boiler?

A. Yes, sir.

Q. Of what character were these reports?

A. The reports would be sometimes given me by word of mouth; sometimes written reports to give more or less of an idea of any

work which was required to be done, due as previously stated to the natural wear and tear of the engine.

Q. And what kind of work was it that was required to be done by reason of natural wear and tear?

A. Work that would be required to be done; perhaps some oil waste might want cleaning out; perhaps liners on the engine might need renewing or brasses might need closing; and such repairs as might be required due to wear and tear.

Q. Was Mr. Crosby given any instructions with respect to inspecting the engine and boiler?

A. He was told to keep the engine and boiler under constant inspection and that he was to report instantly any repairs necessary.

Q. Did he make any statement to you with respect to the engine and with respect to the character of its work?

A. I never received any other report except statements as to the thorough efficiency of the engine.

Q. Did he ever make any complaints to you about the engine or to your knowledge to anybody else?

A. No, sir.

Q. Who was responsible for the engine in the saw-mill and for its condition?

A. Mr. Crosby was directly responsible for the engine in the saw-mill; directly responsible to me for reporting repairs; it was my duty to supervise the boiler and machinery.

Q. And to whom should he have reported if there was anything the matter with it?

A. To myself, and in my absence to the shop foreman; in such cases, should I be absent, the report would be handed to me on my return, after work had been completed.

Q. How frequently did you speak to Mr. Crosby about the engine?

A. It was my custom to go into the saw-mill once or twice a day during the time I was in Camaguey; that would be some twenty times a month.

Q. What conversation were you accustomed to have on such occasions?

33 A. The conversation would generally be, I would ask if the engine and boiler were giving satisfaction, if sufficient steam was provided; if any repairs were required and invariably unless some minor repairs were reported, which were then attended to, the answer was that the engine and boiler were giving entire satisfaction.

Q. How long have you known Mr. Crosby?

A. Since October 20, 1905.

Q. How much did you see of him after October, 1905?

A. I would see him always when I paid my visits to the saw-mill, as previously stated, some 20 times a month.

Q. What can you say with respect to his capacity and competency to run and take care of the engine and machinery?

A. He seemed a thoroughly competent mechanic and engineer; he was in my opinion a thoroughly competent man.

Q. Was he competent to run an engine and take charge of the machinery?

A. Yes, sir.

Q. Have you seen him run the engine?

A. Yes, sir.

Q. And what did you observe with respect to his care of the engine in the saw-mill and his handling of it?

A. He seemed thoroughly to understand the handling of an engine and thoroughly to understand taking care of it and to be capable of running it.

Q. Did the engine itself show whether it was well taken care of or not?

A. The engine was in good order and thoroughly taken care of.

Q. Are there licensed engineers in Cuba?

A. No, sir.

Q. How are the engineers employed by the Cuba Railroad Company?

A. The engineers are employed by myself, after giving them an examination by a Board consisting of myself and the general foreman, such examination as I may deem to be necessary for the various positions they may be apt to fill.

Q. When did the saw-mill commence to run?

A. On November 13th, 1905.

Q. Who was in charge of it?

A. Mr. Crosby, the plaintiff.

Q. Who did the fireman's work on the boiler in the saw-mill and how was he appointed to that position?

34 A. When the saw-mill first commenced to run, a fireman by the name of True was appointed. He commenced working on the 13th of November, the day the Saw-mill first commenced to run.

Q. What instructions was this fireman given with respect to his duties?

A. He was told to report directly to Mr. Crosby, the plaintiff; he was to take care of the boiler.

Q. You say he was told; you mean he was instructed?

A. He was instructed to fire the boiler, take care of its water, and clean and oil the engine.

Q. What instructions was he given as to the person who was in charge of the engine?

A. He was instructed that he was directly under the orders of Mr. Crosby; that Mr. Crosby would take charge of the running of the engine.

Q. How long did True continue in the position and why did he leave?

A. True was in this position until March 19, 1906; in the month of January he was sick about eighteen days, during which time Mr. Crosby, the plaintiff, appointed another fireman to replace him, entirely of his own initiative, without my knowledge; when the man had been working some two days, I gave him an examination and found him satisfactory, and made no objection to his employ-

ment. True then returned to work and continued in the employ of the company until March 19, 1906, when he left for reasons of his own, supposedly to return to the States.

Q. Who took the position after True left?

A. After True left, a fireman named Porro was appointed from March 19th until April 19th, 1906.

Q. Why did Porro leave?

A. Porro left on account of a complaint from Mr. Crosby, the plaintiff, that he could not keep steam in the boiler.

Q. Did Crosby ask to have him removed from that position?

A. Crosby asked to have the man removed and another man was placed there at his request.

Q. Who was given this position as fireman?

A. Bonet was then appointed as fireman on April 20, 1906.

Q. What is his full name?

A. Jose Bonet y Riera.

Q. What had been Bonet's position prior to his assignment as fireman in the saw-mill?

A. Bonet had been locomotive fireman on the main line; previous to that yard fireman; previous to that engine watchman, having gone through the regular routine necessary to become a proficient man as line fireman.

Q. What was his reputation as to competency and faithfulness?

A. He was an entirely competent and faithful man.

Q. And had such reputation?

A. And was perfectly capable of performing the duties required of him and had such reputation.

Q. What had been his duties prior to his appointment as fireman in the saw-mill?

A. His duties in the position he held previous to entering the saw-mill were the ordinary duties of a fireman, which were as follows: To take care of the fire and water on an engine, watch the engine when the engineer is away and frequently when so ordered by the engineer to move or run the engine, to do any switching which might be required.

Q. Had he ever shown any lack of capacity, skill or faithfulness?

A. He had always shown himself and proved himself to be a very capable and trustworthy man.

Q. Had you ever received any complaints about him?

A. I have never received any complaints, but the reverse. He has always been commended.

Q. When you appointed Bonet to the position in the saw-mill did you say anything to Crosby about it, and if so, what?

A. Mr. Crosby was advised at the time when Bonet was appointed that he would be put there temporarily and I would make efforts to give him an American fireman as, due to his not speaking the Spanish very fluently, it would be better for him perhaps to have an American fireman and at the same time, Bonet was a very capable man as line fireman and there were several other men capable of attending to a fixed boiler, which would thus relieve Bonet for locomotive work, as he was considered a very superior fireman.

Q. Did Mr. Crosby say anything to you about his leaving this position?

A. When I mentioned that I desired to take Bonet away Mr. Crosby particularly requested me to leave him in the position as he said he was the best man he had had there.

Q. Was this some time after he had been employed in the saw-mill?

A. Yes, sir; about a month after he had been employed there.

Q. About a month after he had been employed there?

A. Yes.

Q. Did Crosby ever complain to you of Bonet?

36 A. No, sir.

Q. Did he ever complain of him as incompetent or unfaithful to anybody, so far as you know?

A. No, sir.

Q. Did he ever complain of him on account, so far as you know, to anyone?

A. No, sir.

Q. Did you ever have any reason to believe or did you ever have any information that Crosby had ever made any complaint of Bonet to anyone?

A. I had no reason to so believe, nor information to that effect.

Q. Did you have frequent interviews with Mr. Crosby, and if so, state their purport and how often those interviews took place.

A. Yes, when I was in Camaguey, frequently twice a day, that is to say a total of about twenty times a month; as a rule the conversation would be with reference to the efficiency of the engine and boiler.

Q. Did you ever see the engine in the saw-mill started and stopped?

A. Yes, sir.

Q. Frequently?

A. Frequently.

Q. Who started it and stopped it when you were present?

A. Almost invariably Mr. Crosby, the plaintiff; occassionally I have seen another employee named Kile start and stop the engine on two occasions. I have done so myself.

Q. Did you ever see Bonet start and stop the engine?

A. No, sir.

Q. Did you ever observe anyone except Mr. Crosby perform the duties of engineer in the saw-mill?

A. No.

Q. What were Bonet's instructions as to the person from whom he was to take his orders?

A. That he was to receive instructions directly from Mr. Crosby and that he was directly under his orders.

Q. Did you ever hear that the engine in the saw-mill had run away before the accident on June 16?

A. I have never heard so.

Q. Was there ever an accident in the saw-mill except the one on June 16, that you knew of or heard of?

A. No, sir; none at all.

Q. Do you recollect the accident on June 16, 1906?

37 A. Yes, sir.

Q. State what you observed of it and what you did.

A. About 3 o'clock P. M., on the afternoon of the 16th of June, 1906, I was sitting in my office, when I suddenly heard the noise of an excessive escape of steam, which I noticed came from the saw-mill. I immediately got up and ran over there, and as I was entering at the east entrance I saw Mr. Crosby coming out; he was assisted by some other employees. I immediately noticed that some accident had happened to the machinery and continued into the saw-mill until I arrived at the engine. I then noticed this pulley had broken and saw the pieces on the ground.

Q. Who was the man supporting Mr. Crosby?

A. Kile was supporting Mr. Crosby on one side and the other man it is not possible for me to state.

Q. What has become of Kile?

A. Mr. Kile has since died.

Q. How far was your office from this saw-mill?

A. About 130 yards from the saw-mill.

Q. Go on and tell us what you observed, Mr. Knight.

A. After seeing the pieces of broken pulley on the floor, I also saw that the fireman Bonet, who was standing beside the engine, with blood running down his face and that he had received a blow in the head.

Q. Anybody else there?

A. And standing by him also was a car repairer, an employee named Juan Garcia. I gave orders for Bonet to be attended to and removed to the hospital, and then immediately returned to the office to see if I could render any assistance to Mr. Crosby. Orders were then given to take him to the hospital.

Q. What did you find at the office?

A. When I arrived at the office I found Crosby was being attended to; that his wound was being bandaged up and first aid was being rendered; I then gave orders for proper care to be shown and for an engine to take him to the hospital in town.

Q. Then what did you do?

A. After that I then returned to the saw-mill to try to find out as far as possible the cause of the accident.

Q. What did you observe?

A. The first thing on arriving there I naturally thought that the cause of the engine running away was most probably due to some failure of the governor; and the first thing I did was to try the governor. I seized hold of it and tried to move the gears; I could not do this, and on finding out the cause, the reason of not

38 being able to move it, I observed a small piece of waste about three-eights of an inch thick and five-eights of an inch long, imbedded in the gear. I removed this waste and then could move the gear wheels freely; after this I examined the broken pieces of wheel, which would be some twenty pieces in number, to try to find any flaw. It was not possible to find any flaw.

Q. Did you find any flaw in the broken pieces of wheel?
A. I could not find any flaw of any description.
Q. Describe the pulley that broke.
A. The pulley in question was a large cast iron wheel 48 inches in diameter, 10½ inches in the face and 2 15/16 inches bore.
Q. How much did it weigh?
A. It would weigh some 280 pounds.
Q. What was its purpose?
A. It was used to transmit motion from the main shaft to the six-inch band saw.
Q. And how would it transmit this motion?
A. It transmitted this motion by a leather belt.
Q. What in your opinion was the cause of the accident?
A. The only opinion, the only reason that I can give as the cause of the accident, was due to this small piece of waste becoming imbedded in the cog wheel of the governor.
Q. Well, that did not cause the wheel to break.
A. This piece of waste caused the governor to stop and thus lose its proper function, thus allowing the engine to race.
Q. What effect would the racing of the engine have upon this pulley wheel that broke?
A. The racing of the engine caused the pulley to run at an excessive speed.
Q. Why should it break when run at an excessive speed?
A. As no visible flaw existed, the only reason that I can possibly give for the pulley in question breaking is due to defective contraction in the casting.
Q. How would that operate?
A. The effect of defective contraction would be that as soon as the wheel is subjected to excessive velocity, the part where the contraction is defective, being weaker than the rest of the wheel, would tend to cause it to fly apart or break.
Q. If the accident was caused as you have described, could the weakness which led to the pulley's flying apart have been observed by inspection of the pulley?
A. It would have been impossible to observe it by inspec-
39 tion. The only way to find out would be to try it by such a test as caused its breakage in this instance.
Q. Would such a test have been practical or usual?
A. Such a test would not have been practical or usual.
Q. In the machine shop?
A. No, sir; not in the machine shop. When the pulley was first designed and cast it was so designed to stand any strain that might be put upon it.
Q. What maker's name was on the machinery?
A. J. A. Fay Egan & Company, Cincinnati, Ohio.
Q. Are you familiar with the name of that firm and their reputation?
A. Yes, sir.
Q. What is their reputation?

A. Their reputation is considered the highest, and their machinery is considered of the greatest repute.

Q. Did you see this particular wheel that broke and the shafting when it was being installed?

A. Yes, sir.

Q. Who was installing it?

A. Mr. Crosby was installing it.

Q. Mr. Crosby, the plaintiff?

A. Yes, sir.

Q. Did Mr. Crosby make any remark to you at the time with respect to his superintending any such work?

A. Mr. Crosby told me that he was perfectly conversant with the installation of shafting and machinery and so on; that he had frequently installed machinery previously.

Q. What happened to Mr. Crosby after the accident?

A. After the accident he was taken to the hospital.

Q. What were his wages at the time of the accident?

A. $125.00 per month.

Q. Were his wages paid by the company while he was recovering?

A. His wages were continued the whole of the time, in addition all his expenses incidental to the accident were paid.

Q. Have you any reason to believe or to suspect that the machinery and the wheel that broke or the engine were not in perfect condition before the accident happened?

A. I believed them to be in thoroughly good condition.

Mr. BALDWIN: That is all.

No cross-examination.

WILLIAM E. KNIGHT.

40 Sworn to and subscribed before me this 21st day of May, 1907.

JOSE ALVAREZ GONZALEZ,
Notary Public. [SEALS.]
JOHN F. HANSON,
American Consular Agent,
Appointed by the Above Order of the
Court to Take the Above Testimony.

JOSÉ BONET Y RIERA, a witness called on the part of the defendant, being duly sworn according to the laws of the State of New Jersey, was questioned by Henry de Forest Baldwin and answered the questions as follows:

Q. What is your name?

A. Jose Bonet y Riera.

Q. How old are you?

A. Thirty-four years.

Q. Where were you born?

A. The town of Santa Ines, Mallorca Island, Spain.

Q. When did you come to Cuba?

A. In the year 1891.

Q. What was your occupation when you first came to Cuba?
A. I was a soldier, a private.
Q. Were you a soldier in the Spanish army during the war with the United States?
A. Yes, sir.
Q. When did you leave the Spanish army?
A. When the Spanish troops evacuated the island.
Q. Was that in the year 1898?
A. Yes, sir.
Q. What occupation did you follow after leaving the army in 1898?
A. I was employed in the tannery at Nuevitas.
Q. For how long?
A. Eighteen months.
Q. What employment did you have after that?
A. On the Cuba Railroad.
Q. Have you worked for the Cuba Railroad Company continuously ever since?
A. Yes, sir.
Q. What work did you first do for the Cuba Railroad?
A. Watchman around the engines.
Q. What work did you do for the road after you ceased to be a watchman around the engines?
A. Yard fireman.
Q. What were your duties as engine watchman?
A. As an engine watchman I had to light the engines, keep them supplied with water and have them ready for duty whenever they were required.
Q. What do you mean by having them ready for duty?
41 A. To have the engines with water and with coal, lighted up and in perfect order to be put in motion.
Q. Would you get steam up?
A. Yes, sir.
Q. What were your duties as yard fireman?
A. To take care of the fire, the coal, water and to do as I was told by the engine driver.
Q. Were you employed as yard fireman on the engine?
A. I had to be on the engine within the yard.
Q. Was it your duty to get up steam?
A. Yes, sir.
Q. When you have spoken of engines you mean locomotive engines, do you not?
A. Yes, sir.
Q. After being yard fireman, what was your next position?
A. I entered as fireman on the main line.
Q. As fireman on a locomotive engine, did you ever move the engine?
A. Yes, sir; whenever the engineer had to attend to other business, I ran the engine myself.
Q. How much would that amount to?
A. That is to move the engine in the yards.

Q. Would you switch cars?
A. Yes, sir.
Q. Would you take the engine into the round house in the yards?
A. Yes, sir.
Q. What position did you fill after April, 1906; as a fireman in the saw-mill? What was your duties while you were employed in the saw-mill?
A. I had to mind the fire, attend to the water and steam and clean the engine.
Q. Who gave you your orders in the saw-mill?
A. Mr. Crosby.
Q. Did you see the engine in the saw-mill stopped each day and started each day while you were employed there?
A. Yes, sir.
Q. Who started and stopped the engine during the time of your employment in the saw-mill?
A. Mr. Crosby.
Q. Did you ever see anyone else there start and stop the engine in the saw-mill?
A. No, sir.
Q. Did you ever start or stop the engine in the saw-mill you yourself?
A. No, sir.
Q. What instructions had you received with respect to cleaning the machinery while in motion?
A. That no machinery while in motion could be greased or cleaned because a piece of waste might get in it and cause trouble.
42 Q. From whom did you receive such instructions?
A. From the engineer or the engine drivers themselves and also from the master mechanic and chief of the machinery department.
Q. Did Mr. Crosby speak Spanish?
A. Very little, but enough to give some orders.
Q. Do you recollect what happened on June 16, 1906?
A. Yes, sir.
Q. State what you saw of the accident on that day.
A. I was cleaning the cylinder governor on the engine and I heard a very queer noise; when I looked about I saw that the engine was running faster and I rushed to try to stop it. At the same time I saw Mr. Crosby rush to do the same thing and we got mixed up and at that moment I received a blow which knocked me senseless and I don't know what happened next.
Q. Did you ever know or hear of any trouble with the engine or any machinery in the saw-mill before this accident?
A. No, sir.

Mr. BALDWIN: That is all.
No cross-examination.

JOSE BONET Y RIERA.

Sworn to and subscribed before me this 21st day of May, 1907.

JOSE ALVAREZ GONZALES,
Notary Public. [SEAL.]

JOHN F. HANSON,
American Consular Agent.
Appointed by the Above Order of the Court to Take the Above Testimony.

JUAN GARCIA Y ARDUIN, a witness called on the part of the defendant, being duly sworn, according to the laws of the State of New Jersey, was questioned by Henry de Forest Baldwin and answered the question- as follows:

Q. What is your name?
A. Juan Garcia y Arduin.
Q. What is your age?
A. I belong in Camaguey and am 22 years old.
Q. Where are you employed?
A. I am employed by the Cuba Railroad Company.
Q. What position do you have there?
A. I work in the car repair shop of the Cuba Railroad Company.
43 Q. Do you remember June 16, 1906?
A. Yes, sir.
Q. Where were you working on the afternoon of June 16, at about 3 P. M.?
A. About 100 feet to the west of the saw-mill.
Q. What did you hear?
A. I heard a sort of big noise on top of the roof of the saw-mill.
Q. You heard a big noise?
A. As though something bumped on the roof and side of the saw-mill. I heard some big noise in the saw-mill.
Q. What did you do then?
A. I took my cap in my hand and run as quick as I could to the saw-mill.
Q. What did you see as you entered the building?
A. I saw the machinery, the engine running away.
Q. What did you then do when you saw the machinery running away?
A. I closed the steam.
Q. You shut off the steam?
A. I shut off the steam.
Q. Did you see anybody there?
A. I don't know sure whether I saw Crosby or not; I saw a fellow going out of the east door.
Q. You saw a fellow coming out of the east door?
A. Yes, sir.
Q. Did you see anybody else?
A. No, sir.
Q. Did you see Bonet?
A. Yes, sir.

Q. Where did you see Bonet?
A. In the house, inside the saw-mill.
Q. You saw Bonet?
A. Yes, sir.
Q. Where did you see him?
A. I saw Bonet with his hands on the throttle.
Q. On the throttle of the engine?
A. Yes, sir.
Q. Was Bonet standing with his hands on the throttle of the engine when you shut off the steam?
A. Yes, sir.
Q. In what condition did you find Bonet?
A. The blood came from his head; he was half stunned.
Q. Do you understand both English and Spanish?
A. Yes, sir.

Mr. BALDWIN: That is all.
No cross-examination.

JUAN GARCIA Y ARDUIN.

Sworn to and subscribed before me this 21st day of May, 1907.
JOSE ALVAREZ GONZALEZ,
Notary Public. [SEALS.]

JOHN F. HANSON,
American Consular Agent.
Appointed by the Above Order of the Court to Take the Above Testimony.

44 SAMUEL W. COMBS, a witness called on the part of the defendant, being duly sworn according to the laws of the State of New Jersey, was questioned by Henry de Forest Baldwin and answered the questions as follows:

Q. What is your name?
A. Samuel W. Combs.
Q. How old are you?
A. 41 years of age.
Q. What is your occupation?
A. My occupation is Master Car Builder for the Cuba Railroad Company.
Q. Where were you born?
A. I was born near Pottstown, Pa.
Q. Where did you commence the work you are now engaged in?
A. I commenced to work for the Jackson Sharp Company, car builders, at Wilmington, Del., at the age of 20 years, I was a skilled mechanic.
Q. State what your experience as a mechanic has been.
A. I worked four years for the Jackson-Sharp Company. I then went abroad to erect cars for said company; I then took a position with the Wagon Lit Company at St. Denis, near Paris, as foreman of car construction. I kept this position 18 months and then returned to the Jackson-Sharp Company. After working for Jack-

son-Sharp Company one year I then left and went with the Patterson St. Railway Company, Patterson, New Jersey, as foreman of the car repairs. I then returned after one year to the Jackson-Sharp Company and took my old position of going away to erect cars for the Jackson-Sharp Company in foreign countries. In addition to this I was general inspector of the company during this time.

Q. Where were you general inspector?

A. At the Jackson-Sharp plant, Wilmington, Del.

Q. When were you first employed and in what capacity by the Cuba Railroad Company?

A. I was appointed Master Car Builder the first of January, 1905.

Q. What have been your duties in your present position with the Cuba Railroad Company?

A. My duties with the Cuba Railroad Company are to keep all rolling stock in repair, build cars and do all mill work for the road.

Q. What have been your duties with relation to the saw-mill?

A. I have entire charge of the saw-mill, and hire and discharge all men except the fireman in this mill.

Q. How is the fireman employed?

A. The fireman is assigned to duty in the saw-mill to Mr. Knight, Superintendent of Motive Power.

Q. Do you know the plaintiff, Crosby?

A. I do.

Q. When did you first know him and what was he doing then?

45 A. I have known Mr. Crosby since early in the year 1905. He was then employed as a general all around man in Allen & Rey's saw-mill in Camaguey.

Q. Did he tell you how long he had been employed there?

A. He told me he had worked for the Allen & Rey Company for over a year but was dissatisfied on account of his wages.

Q. Did he apply to you for a position?

A. He applied to me for a position.

Q. State when and under what circumstances the machinery now operated by the Cuba Railroad Company in the saw-mill at Camaguey was purchased?

A. The machinery in the Camaguey saw-mill in the shops at Camaguey was purchased from the J. A. Fay Egan Company through their representative, a man by the name of Adams, at Camaguey, in the month of June, 1905.

Q. Were you there.

A. I was there and recommended that this machinery should be bought from the J. A. Fay Egan Company.

Q. What was the order?

A. The order was for the entire machinery of the saw-mill, pulleys and shaftings.

Q. What class of machinery was ordered?

A. The machinery was specified to be first-class and the best that could be had, in every particular.

Q. Was all the machinery in the saw-mill purchased from J. A. Fay Egan & Company?

A. All the machinery was purchased from J. A. Fay Egan & Company with the exception of the engine and boiler.

Q. Are you familiar with the name of J. A. Fay Egan & Company as makers of machinery?

A. I am and have been familiar with the name of J. A. Fay Egan & Company for years and their machinery and know them to be a reputable firm, manufacturers of first-class machinery.

Q. Do you know their reputation?

A. I know their reputation to be of the best.

Q. What did you do with reference to obtaining men to install the saw-mill machinery?

A. I advertised in the Cincinnati Inquirer for a man to come to Camaguey to install machinery and after installation to take charge of the saw-mill as foreman.

I received about a dozen applications; of these dozen applications I selected a man by the name of Wolf who had as reference, J. A. Fay Egan & Company; he was particularly recommended to me, however, by a man named Parker who works as foreman for J. R. Solis Company, who operates a saw mill in Camaguey.

46 Q. When did Wolf arrive, how long did he work for the company and under what circumstances did he leave?

A. Well, he arrived some time the latter part of August and left the last of September, after receiving a cablegram from the United States saying his wife was dying.

Q. Whom did you employ to assist Wolf?

A. I employed the plaintiff, Mr. Crosby.

Q. Did you have any conversation with him at that time?

A. Yes, sir.

Q. State it.

A. When Wolf went to the States, Mr. Crosby applied to me for the position as foreman of the mill; I told him if Wolf did not return I would give him the position as foreman of the saw-mill.

Q. Did Crosby say anything to you about his capacity?

A. Mr. Crosby told me he had worked in the saw-mill business ever since he was a boy twelve years of age in a saw-mill operated by his father in one of the Southern States.

Q. Did he say whether or not he had run his father's mill?

A. He told me he had had complete charge of his father's mill.

Q. Had you observed his work?

A. I had observed his work, that he was very competent, first-class mill man, capable of running the mill, capable of being foreman of the mill.

Q. Did he say that he was competent to finish the installation of this machinery and to be foreman of the mill?

A. He told me he was perfectly competent to take charge and install all machinery in the mill.

Q. Did he say anything with reference to his experience in installing machinery?

A. Mr. Crosby told me he had installed saw-mills before in the Southern States. I also had a talk with Mr. Allen of the firm of

Allen & Rey and he recommended Crosby to me as being a very good man.

Q. Did Crosby give his reasons for leaving Allen & Rey?

A. Mr. Crosby said he wanted to leave Allen & Rey because they could not pay him enough money.

Q. What did Allen & Rey say to that?

A. Allen & Rey said they were very sorry to lose him, but under the conditions of their business they could not pay him any more.

Q. Who installed the pulley that broke and the shafting carrying it in the saw-mill?

A. The pulley and shafting of the saw-mill was installed under the personal supervision of Mr. Crosby, the plaintiff.

Q. Well, what do you mean by personal supervision?

47 A. He had entire charge of the installation of this pulley and shafting.

Q. Was he there?

A. He was there.

Q. Did he use his own hands in putting it up?

A. He used his own hands, yes, sir.

Q. Did you give any instructions to Crosby and if so what as to dealing with defects in the machinery and with respect to inspecting the machinery?

A. Mr. Crosby had orders to continually inspect all the machinery, pulleys and shafting in the mill and any defects found he was to immediately report to the mechanical department and have them repaired at once.

Q. You say he had orders, who gave him the orders?

A. I gave him the orders.

Q. Did he ever report any defect in the wheel that broke or in the shafting?

A. He never reported any defect in the wheel or shafting.

Q. Did he ever complain it was not in all respects adequate and safe for the work which it had to do?

A. He never complained it was not safe to run.

Q. Did he ever complain of it at all?

A. He never complained of it; never made any report whatever to me.

Q. Did he ever make any report to anyone else so far as you know?

A. He never reported to any one else to my knowledge.

Q. Did he ever make any complaint to you with respect to any of the machinery in the saw-mill?

A. He had reported four or five times that the engine needed slight repairs and after reporting this the repairs were effected at once.

Q. Of what character were these slight repairs he reported?

A. The governor would get dirty and need cleaning.

Q. Those were all the repairs you can give?

A. Those are all the repairs I can recollect.

Q. How many times did that happen?

A. That happened four or five times.

Q. Was that unusual in the case of machinery, that it needs cleaning?

A. No, sir; machinery has to be cleaned.

Q. What were Crosby's orders given by you with respect to reporting defects in the engine?

A. Crosby's orders were to report all defects to Mr. Knight, the Superintendent of Motive Power, or his representative in the mechanical department.

48 Q. Was there at the time of this accident any complaint by Crosby about the engine needing to be cleaned or anything else with respect to the engine that had not been attended to?

A. Nothing that Mr. Crosby had reported that had not been attended to.

Q. Irrespective of whether he reported anything or not, was there anything that was known to need repair that had not been attended to at the time of the accident?

A. Not to my knowledge.

Q. What instructions did you give Mr. Crosby with respect to his duties in the saw-mill?

A. Mr. Crosby's orders were to be in the saw-mill from 6 o'clock A. M. to 11 A. M.

Q. When you say he had orders, you mean you gave him orders?

A. I did; I gave Mr. Crosby orders to be in the saw-mill from 6 A. M. to 11 A. M., and from 12 P. M. to 5 P. M., every day except Saturday; on Saturday we shut down at 4 P. M., in the afternoon. He also had orders and authority to assign any man under his charge to any particular duty that he saw fit.

Q. Were there any engineers among the employés of the saw-mill under Crosby's orders?

A. Yes, Mr. Kile.

Q. Well, was he an engineer?

A. He was a licensed engineer in the United States.

Q. Did Crosby know this?

A. Some few months before the accident Mr. Kile informed Mr. Crosby that he was a licensed engineer in the States.

Q. In your presence?

A. In my presence.

Q. Did you ever see Kile start or stop the engine?

A. I saw Kile start and stop the engine on a few occasions when I was in the saw-mill, but the engine was almost invariably stopped and started by Mr. Crosby, the plaintiff.

Q. You have seen Crosby stop and start the engine?

A. I have, yes.

Q. What became of Kile?

A. Kile died in the latter part of April, 1907.

Q. Were you present in the saw-mill on June 16th, 1906, about 3 o'clock in the afternoon?

A. I was present at the time of the accident on June 16th, at 3 P. M.

Q. State what happened at that time and what you observed and did?

A. I was standing about 15 feet away from the engine giving in-

structions to Mr. Crosby, the plaintiff, when we noticed that
49 the engine had started to race; Mr. Crosby walked over to the engine to stop it. At the time Mr. Crosby arrived there I noticed the fireman Bonet had his hand on the throttle.

Q. What was Bonet doing at that time?

A. Bonet was cleaning the engine. When Crosby arrived there Bonet had his hand on the throttle attempting to close the engine. From my position they seemed to become confused; one was trying to turn it one way and one the other. An instant later the pulley overhead had exploded, one piece of which struck Fireman Bonet on the head and the other piece struck Crosby on the right hand. Crosby immediately left the engine and started over toward the east end of the mill. I walked over there and met Crosby and saw he was injured, and gave Kile instructions to have him sent to the hospital and give him proper attention. I then went back to the engine and found that one Juan Garcia, in the employ of the car department, had shut down the engine. Bonet was still at the engine. A few moments after Mr. Knight arrived at the engine. We examined the pulley that had burst but could not find any defects in same; while making our examination Mr. Knight took hold of the governor and found it would not work. Immediately after he called my attention to a small piece of waste in the cogs. After removing this piece of waste the cogs worked freely.

Q. Describe the pulley that broke.

A. The pulley was a cast iron wheel 48 inches in diameter, 10 1-2 inch face, bored at 2 15-16 inches on the shafting; it weighed possibly about 280 pounds.

Q. What did the wheel do?

A. The wheel transmitted power from the main line shafting to a six-inch band saw.

Q. How?

A. By means of a leather belt.

Q. Did Crosby ever complain to you of Bonet?

A. Crosby never complained to me of Bonet.

Q. Did he ever complain of him to anyone else to your knowledge?

A. Not to my knowledge.

Q. How soon after the accident did Crosby come back to work?

A. Crosby came back to work about one month after the accident.

Q. Did he work full time?

A. He only worked about a couple of hours a day.

Q. What did you say to him?

A. He complained to me that he was afraid of some of the men striking his wounded arm. I then told him that he had better not come around the mill too often until he became perfectly well.

Q. Did you have any conversation with Crosby before the accident with respect to his salary? If so state what it was.

50 A. Mr. Crosby asked me before the accident to advance his salary. I told him that I would think it over, but that I could not give him any more than $145 a month, which was the

salary received by the general foreman of the mechanical department.

Q. Did you have any conversation with him after the accident as to his working for the company in the future and as to his salary?

A. I had a conversation with Mr. Crosby after the accident and told him that the accident would have no bearing on the matter of his salary, on his receiving an advance in his salary; that I did not consider that he required his two hands to do the work he had been doing; that I would take the matter up with Mr. Galdos and if he was agreeable we would give him the $145 a month.

Q. Who is Mr. Galdos?

A. Mr. Galdos is the General Manager of the Cuba Railroad Company.

Q. Did you have any further conversation with Crosby on this subject?

A. Mr. Crosby asked me if I would go down and see the General Manager, Mr. Galdos, about the raise in his salary, and we went to his office; I then repeated my conversation with Mr. Crosby to Mr. Galdos.

Q. In Mr. Crosby's presence?

A. In Mr. Crosby's presence Mr. Galdos said that if I recommended Mr. Crosby for an increase of salary that he had no objection. Mr. Crosby then asked Mr. Galdos if he would grant him the position as foreman of the saw-mill for an indefinite period. Mr. Galdos said he could not do this, but as long as he was General Manager of the Cuba Railroad Company and I was Master Car Builder, that he need not have any fear of being removed.

—. ——.

A. Crosby then said that he would think it over and reserve his action.

Q. What was done by the company with respect to taking care of Crosby after the accident?

A. Mr. Crosby was taken to the general hospital in Camaguey. He then sent word to me through Mr. Kile to request me to have someone sent to the hospital that spoke Spanish and English so that he would not have his fingers taken off. I telephoned Mr. Crosby's request to Mr. Galdos, who then sent Mr. Rosada, his private secretary, to the hospital, who saw that Mr. Crosby's request was fully complied with.

Q. Did you receive any word through Kile about his leaving the hospital?

A. After Mr. Crosby had been at the general hospital for about sixteen hours, he sent me word that he was very much dissatisfied with the treatment that he was receiving, and requested to be removed to Dr. Harris, a physician in Camaguey, in whom he had every confidence.

51 Q. How did he send you this word?

A. He sent the word through Mr. Kile. I instructed Mr. Kile to get a cab and take Mr. Crosby to Dr. Harris.

Q. Who was Dr. Harris?

A. Dr. Harris was a physician and surgeon in Camaguey.
Q. Does he run an establishment?
A. He run a sort of sanitarium.
Q. A private hospital?
A. A private hospital, yes.
Q. What happened at Dr. Harris'?
A. Dr. Harris took full charge of the case and cut off his hand.
Q. Did he take him to his hospital?
A. He took him into his hospital.
Q. Who paid the bills at the hospital?
A. The company paid the bills at the hospital.
Q. How long was Crosby with Dr. Harris?
A. Crosby was at Dr. Harris' house thirteen days.
Q. Was his salary continued while he was laid up?
A. His salary was continued while he was laid up.
Q. What did the company do with respect to his doctor's bills?
A. The company paid all his doctor bills and paid his food and lodging while there.
Q. Can you give a statement of what the company paid on his account?
A. The company paid Dr. Harris $50 for the operation; $26 for lodging and meals and $26 for attendance after the operation. They also paid Dr. Roura, consulting physician, $50 for his services. They also paid A. Cassas' drug store $19.40 for drugs and medical supplies purchased on account of Mr. Crosby.
Q. When did Mr. Crosby leave the service of the company?
A. Mr. Crosby left the service of the company of his own will on the 31st day of August, 1906, and was paid in full to that date.

SAMUEL W. COMBS.

Sworn to and subscribed before me this 21st day of May, 1907.

JOSE ALVAREZ GONZALEZ,
Notary Public,

[SEALS.] JOHN F. HANSON,
American Consular Agent,
Appointed by the Above Order of the Court to Take the Above Testimony.

52 In the Circuit Court of the United States, District of New Jersey.

WALTER E. CROSBY, Plaintiff,
against
THE CUBA RAILROAD COMPANY, Defendant.

We, Jose Alvarez Gonzalez, of Camaguey, Cuba, and John F. Hanson, of Nuevitas, Province of Camaguey, Cuba, duly appointed special commissioners herein to take testimony by an order herein, dated the 11th day of March, 1907, and duly commissioned, qualified and authorized to administer oaths and to take and certify depositions do hereby certify that pursuant to the annexed notice, duly issued and served in the cause now pending in the Circuit Court of the United States for the District of New Jersey, wherein Walter E.

Crosby is plaintiff and The Cuba Railroad Company is defendant, we were attended at the office of said Jose Alvarez Gonzales, at No. 24 Maximo Gomez street, in the City of Camaguey, by Henry de Forest Baldwin, counsel for defendant, on the said several days and dates hereinbefore stated; that aforenamed witnesses, William E. Knight, Samuel W. Combs, Juan Garcia and Jose Bonet, who were of sound mind and lawful age, and were by us first carefully examined and cautioned and duly sworn to testify the truth, the whole truth and nothing but the truth, and they thereupon testified as is above shown, and the depositions by them subscribed, as above set forth, were reduced to writing by Isabel Beecher Albert, stenographer, who had duly taken the oath required by Section 48, Chapter 150, Laws of New Jersey, 1900, which oath is hereto annexed in the presence of the witnesses themselves, and after the statements of them, and were subscribed by the said witnesses in our presence and were taken at the place in the annexed notice specified and at the time as set forth, adjournments being had or taken from day to day, as provided for in said notice, and that all was so done, written and signed in the presence of said counsel for said plaintiff and defendant.

We further certify that the reason for taking said depositions was and is, and the fact was and is, that all of the deponents live in the Republic of Cuba, and do not reside within the United States of America; neither of us are of counsel nor attorney for either of the parties to the said suit, not interested in the event of said cause, and it being impracticable for us to deliver said depositions and the exhibits thereto attached with our own hand into the Court
53 for which they were taken, we have retained the same for the purpose of being sealed up and directed with our own hand and speedily and safely transmitted to the said Court for which it was taken, and to remain under our seals until there opened.

Witness our hands and seals as such examiners and special commissioners at Camaguey, Republic of Cuba, on this 20th day of May, A. D. 1907.

[SEALS.]

JOHN F. HANSON.
American Consular Agent,
JOSE ALVAREZ G.,
Notario Publico,
Commissioners Appointed by the Above Order of the Court to Take the Above Testimony.

Consular fee, $48.00, U. S. gold.

The following are the addresses and endorsements on the envelope enclosing the return of the above commission to the Court.

To the Judges holding the Circuit Court of the United States for the District of New Jersey, Trenton, New Jersey, United States of America.

Opened in open Court, May 27, 1907.

W. M. LANNING, *Judge.*

Filed May 27, 1907.

H. D. OLIPHANT, *Clerk.*

Deposited by us in the post office in the City of Camaguey, Republic of Cuba, on the 21st day of May 1907, at — o'clock in the afternoon.

JOSE ALVAREZ G.,
Notary Public.
JOHN F. HANSON,
American Consular Agent.

Defendant rests.

54 WALTER E. CROSBY, Plaintiff recalled in rebuttal.

Direct examination by Mr. KALISCH:

Q. Mr. Crosby, the piece of waste three-eighths by five eighths of an inch, would that have been sufficient to cause the governor to act the way it did?
A. No, sir.

Mr. BALDWIN: I object to that on the ground that *that* it is not shown that he is an expert in these matters.

Q. With reference to the cleaning of the machine, the governor, or cleaning up any parts of the engine, was that necessary to report to anybody?
A. No, sir.
Q. That was under your supervison, was it?
A. Yes, sir.

Plaintiff in rebuttal rests.
Case closed.

Mr. BALDWIN: May it please your Honor, I now renew my motion to dismiss and request the Court to instruct the jury to render a verdict in favor of the defendant, and that there is no evidence of any negligence on the part of the defendant; that the plaintiff has been shown to be guilty of contributory negligence and if the accident was caused by the negligence of any other person in the saw-mill, that other person was a fellow servant, and therefore the Company is not liable in case through his negligence Crosby was injured.

Also on the ground that the plaintiff states, and the evidence shows, that he was in a safe place at the time of the accident and that he voluntarily placed himself in a position which he knew was dangerous.

The COURT: The motion will be overruled and exception allowed.

Mr. BALDWIN: Also on the ground that this Court has not jurisdiction, because it has not been proved that the law in that country gives a cause of action where there is injury on such evidence.

The COURT: The motion is overruled.

Mr. BALDWIN: I pray an exception.

The COURT: Exception allowed and sealed accordingly.

[SEAL.] W. M. LANNING, *Judge.*

55 *Charge of the Court.*

LANNING, *J.:*

Gentlemen: The plaintiff in this case was injured, it is admitted, on June 16, 1906, in the defendant's shop, in Cuba. His right hand was injured and three or four days afterwards his physician and surgeon amputated it. You have to assume that the amputation was necessary and the natural and proper treatment to be given to the man in view of the injury he had received on June 16th, for there is nothing in the evidence that would justify any other conclusion than that,—that the surgeon properly amputated that hand.

The plaintiff comes here without his right hand and he asks you to give him damages against the defendant company. His claim is necessarily based on alleged negligence of the defendant company. The duty is imposed on him by the law to satisfy you by his evidence, that the defendant company was negligent, and that because of that negligence this accident happened. If he fails to satisfy you by a preponderance of evidence that that was the case, then you cannot award damages against the defendant company in his favor. You see, therefore, it is necessary for you in the first place to examine the testimony in the case, with a view of deciding whether you think the defendant company was negligent in the performance of any duty that it owed to the plaintiff.

The law says that it is the duty of an employer (and the defendant was the plaintiff's employer) to supply and provide reasonably safe machinery and reasonably safe appliances for his employees. Any employer who employs a man and asks him to operate machinery, is bound to furnish that employee, not with the very best machinery that can be found in the market of the world, not that, but with reasonably safe machinery,—that is the law.

Now, in this case the defendant furnished this shop with an engine and its apparatus, including boilers, a governor, pulleys and, of course, belts or other proper apparatus connecting the pulleys with the engine.

The plaintiff says that several times within a period of six or seven months before the date of the accident, four or five times, he says, something happened to the engine, so that it ran away, as they term it; that the governor failed to work properly and an excess of steam was admitted into the steam cylinder, and away it went with excessive revolutions of its wheels and ran the machinery with excessive speed causing risk of injury to those who were in the immediate vicinity. That in substance is what the plaintiff says occurred four or five times before June 16th. He says that it occurred on the morning of June 15th, Friday morning, June 15th, as well as on Saturday afternoon, June 16th, being the time when the accident happened. He says further that he reported these operations
56 of the engine to Mr. Knight, the mechanical engineer, four or five times before June 16th, and especially did he report to him on the morning of June 15th.

It seems further, that the evidence of the witnesses for the defendant, as well as that of the plaintiff shows, that the accident was caused by some defect in the operation of the governor of the engine. I suppose there is no mistake about that; you will probably assume that that is practically admitted as a fact in the case, and that for some reason or other the governor would not work properly; and if you take that view of the evidence, then it does seem that the proper supervision of the machine might have guarded against the accident, or at any rate that there seems to be evidence from which you may infer negligence on the part of the defendant company.

There is no negligence shown in this case, on the part of the defendant company in the matter of selecting any of its employees. If there was negligence at all it was in this respect, that the defendant company failed to supply a reasonably safe engine, or having supplied a reasonably safe engine, failed to keep it in a reasonably safe condition for work.

That was the negligence if there was any at all.

If you find that there was negligence on the part of the defendant company, that proper supervision would have guarded against the defects that appear to have existed with reference to this governor, why then, you are ready to advance to the next step in the case. If you find there was no negligence on the part of the defendant company, you at once rendered a verdict of not guilty, but if you find the defendant was guilty of negligence, then you take up the next question in the case, and that is, Was the plaintiff himself guilty of contributory negligence? For it would not matter how negligent the defendant company was, if the plaintiff was also negligent in such a sense as to contribute to the injury that happened to him, he could not recover.

If you keep machinery and employ me to work on that machinery, and you allow that machinery to get out of repair, and I know it, and work on that machinery and keep at it, notwithstanding I know it is defective and dangerous, I am guilty of contributory negligence, and though you are guilty, I am guilty also and can recover nothing. That is the general rule in relation to contributory negligence.

But in this case the plaintiff says, in substance, "It is true I knew this governor got out of order every once in a while and that four or five times before June 16th I went to Mr. Knight and told him that the governor was out of order. It is furthermore true that I went to him on the morning of June 15th, the day before the accident, and told him the governor was out of order, and that
57 I was afraid there would be an accident; that I didn't think it was safe, and that Mr. Knight said to me that he thought it was safe or reasonably safe." It is true that the plaintiff says all that, and therefore, it is true that the plaintiff knew there was danger in operating that machine, that engine. He knew it.

The risk to him was an obvious one, a plain one, and it was not necessary for anybody to explain it to him, for he had discovered himself and had communicated to the superintendent the fact that

the governor was out of order and that the running of the engine was dangerous and that he feared an accident.

But he says, "When I told Mr. Knight that this machine was out of order, that this governor was not working properly and that I feared that there would be an accident, or something to that effect," he said Mr. Knight replied, "I don't think there is much danger, or any danger; you go back to work, the governor is an old governor; there ought to be a new one, and I will have it attended to shortly, or something to that effect." I don't pretend to recall the exact words, and you must depend on your memory and not mine for them, but that, as I recall it, is what the plaintiff says Mr. Knight replied to him. If you believe that that statement of the plaintiff is free from error, that there is no mistake about it, if you think he is telling the truth, the exact truth, and made no mistake in that respect then the law is that the obvious risk which up to that moment had been his, was lifted from his shoulders, because the man in charge of the business, who was the representative of the defendant company, to whom he was authorized to report, said to him, "You go back to your work and I will have the thing attended to." If this was what took place and what Mr. Knight said, then the defendant company assumed the risk and lifted it from the plaintiff's shoulders for a reasonable period, that is, for such a period as would be a reasonable time for the defendant to make repairs to the governor; and after the expiration of that reasonable period, if the plaintiff continued to work there without repairs, then the risk was revived as against him, and he assumed it again. You, therefore, have to settle on this branch of the case the question as to whether a reasonable time for repairing that governor had expired before the accident happened.

You remember that the plaintiff says that he reported to Mr. Knight the defect in this governor on Friday morning; I think it was about nine o'clock, and it appears that the accident happened about two or three o'clock the next afternoon, which was something over twenty-four hours afterwards. Ought the governor to have been repaired within that time? Had the reasonable time expired? If so, then no matter if Mr. Knight did make the promise that the plaintiff said he made on Friday morning, the obvious risk had revived as against the plaintiff, and he cannot recover, and you must conclude that he is guilty of contributory negligence.

58

Supposing you find that the defendant was guilty of negligence and that the plaintiff was not guilty of contributory negligence, then you come to the third question. But before I take that up there is another element in this case. The defendant says that the accident did not happen in the manner the plaintiff insists upon. The defendant says that the cause of the accident was this: that this fireman Bonet was wiping the cylinder of the governor, as I understand the testimony; that he was wiping the cylinder just previous to the happening of the accident, and that after the accident, almost immediately after the accident, Mr. Knight went back to the engine to see, or discover the cause of the accident, and that he found a piece

of waste in the cog-wheel of the governor, and that he tried to work the governor and could not. And I believe Mr. Coombs says, that after the piece of waste was removed the governor could be worked. So the defense says, and the theory of the defence is, that the cause of the accident, the proximate cause, the direct cause, was not negligence on the part of the company. They say the machine was all right, the governor was all right, the machine and appliances were reasonably safe. This is the position taken by the defendant. They say that this piece of waste material got into the cog and impaired its efficiency, prevented its working in a natural and normal way, and that that was the cause of the accident. They say the steam was allowed to enter the cylinder in excessive quantities and to set the engine off racing, and the inference is, I suppose, that when Bonet was wiping the cylinder of the governor, some waste material—although I don't recall any testimony that he was using waste material in wiping the cylinder—some portion of that waste material got into this cog.

If you are satisfied that that was the cause of the accident, that this waste material got into that cog while Bonet was cleaning the machine, and that the waste material prevented the proper and normal operation of the governor, then the plaintiff cannot recover anything for the reason that the thing that caused the accident, the proximate cause of the accident, was the insertion of this waste material into the cog, which got there by the negligence of a fellow-servant, and in that event there can be no recovery.

If you find that the defendant is not guilty of negligence, you come at once into court with your verdict of not guilty. If you find the defendant was negligent and that the plaintiff was guilty of contributory negligence, you again come into court with a verdict of not guilty. If you find that the defendant was guilty of negligence, and that the plaintiff was not guilty of contributory negligence and also that the accident did not happen as a result of a fellow servant's act, then you come to the third question, which is the damages.

59 How much shall the damages be? It will not include any doctor's or surgeon's bills, because it appears the defendant company paid all these. It will include a proper sum for his pain and suffering. No judge can lay down any fixed or definite rule on a subject of that kind; every jury must be controlled on that question by their own good, common sense. Then he is entitled to recover anything that he may have already lost or may lose in the future, by reason of his loss of earning power. I understand the counsel for the plaintiff to take the position that you might not feel disposed to award a very large sum on that ground. I must say, however, that the mere fact that the defendant company offered to the plaintiff to continue him in its employ at $125 per month is not itself sufficient to relieve the defendant wholly from liability, if you find the defendant is liable at all.

It is not shown that the defendant company offered to retain the plaintiff in its employ for the balance of his life, at $125 a month, and therefore you may take that fact into consideration when you

come to consider the amount of damages, if you reach that question at all, and you will award to him such sum as you think reasonable for his physical pain and suffering, and such additional sum as you may think under all the circumstances of the case, in view of the fact that he had a position offered him by the defendant,—such sum as he ought to have under the circumstances. The award must be compensatory, as counsel for plaintiff himself has said. You are not to award against the defendant company anything like punitive damages, but a fair compensation only for the injury sustained. I don't believe I can throw any further light on the subject.

Mr. BALDWIN: I desire to except to the refusal of the Court to charge the fourth request, "If the jury find that the plaintiff put himself in the way of the racing engine with knowledge of its character, the verdict must be for the defendant."

W. M. LANNING, *Judge.* [SEAL.]

I desire to except to that part of your Honor's charge, in which you said, that if the jury believed the story of the plaintiff, that on Friday morning, before the accident, he reported to Mr. Knight that the governor was defective and that he feared an accident, and that Mr. Knight said, I think the engine is safe, and you go back to work and I will have the governor attended to as soon as I can, or words to that effect, that then the obvious risk theretofore assumed by the plaintiff was lifted from his shoulders.

The COURT: An exception is allowed as to that.

W. M. LANNING, *Judge.* [SEAL.]

60 United States Circuit Court, District of New Jersey.

In Tort.

WALTER E. CROSBY
vs.
CUBA RAILROAD COMPANY.

On motion of Samuel D. Oliphant, Junior, attorney for defendant, it is ordered that the plaintiff show cause before this Court at the United States Circuit Court House, in the City of Trenton, on the twenty-fifth day of November, 1907, at thirty minutes after ten o'clock, in the forenoon, or as soon thereafter as the Court can hear the same, why a new trial should not be granted, and that a copy of the reasons for a new trial be served on the attorney for the plaintiff on or before the sixteenth of November instant.

Dated November 12, 1907.

W. M. LANNING, *Judge.*

United States Circuit Court, District of New Jersey.

On Rule to Show Cause Why the Verdict Should Not Be Set Aside and the Action Dismissed or a New Trial Granted.

WALTER E. CROSBY
vs.
CUBA RAILROAD COMPANY.

Mr. Benjamin M. Weinberg, for Plaintiff.
Messrs. Howard Mansfield, Henry DeForest Baldwin, and Charles E. Miller, for Defendant.

LANNING, *District Judge:*

The plaintiff in this declaration avers that on June 18, 1906, he was an employee of the defendant in its planing mill, in the Republic of Cuba; that the mill was furnished with an imperfect and defective steam engine; that on the date above mentioned the engine
61 "ran away," thereby putting a severe strain upon the shafting and pulleys with which it was connected and causing the pulleys to break and fly apart, and that one of the broken parts struck and injured the plaintiff's right hand so that it had to be amputated. He claims damages for the injury thus sustained, charging the defendant with negligence in supplying the mill with an imperfect and defective engine. The only plea filed is that of the general issue.

In the first place, the defendant insists that the Court should set aside the verdict and dismiss the action because the plaintiff has neither alleged nor proven that under the law of Cuba he acquired any right of action against the defendant. Courts do not take judicial knowledge of foreign laws. When necessary to be considered, they must be proven as facts in the case. In Chartered Mercantile Bank of India vs. Netherlands India Steam Navigation Co., 10 Q. B. Div., 521, Lord Justice Brett, at page 536, in referring to the case of The M. Moxam, said: "In that case, whatever the cause of action was, it arose entirely in Spain, and the action was an action in tort, and the well-known rule applies that for any tort committed in a foreign country within its own exclusive jurisdiction an action of tort cannot be maintained in this country unless the cause of action would be a cause of action in that country, and also would be a cause of action in this country. Both must combine if the tort alleged was committed within the exclusive jurisdiction of a foreign country." The same rule is expressed by Dicey in his work on conflict of laws, at page 659. In Scott vs. Lord Seymour, 1 H. & C., 219, and 1 English Ruling Cases, 533, Wightman, J., declared that since the case of Mostyn vs. Fabrigas, Cowp. 161 (copiously annotated in 1 Smith's Leading Cases, 8th American Edition, Page 1027), he was not aware of any rule of law that would disable a British subject from maintaining an action in England for damages against another British subject for assault and battery committed by him

in a foreign country, merely because no damages for such trespass were receivable by the law of that foreign country, and without any allegation that such trespass was lawful or justifiable in that country. "By the law of England," said he, "an action to recover damages for assault and battery is maintainable; and whatever may be the case as between two Neapolitan subjects, or between a Neapolitan and an Englishman, I find no authority for holding, even if the Neapolitan law gives no remedy for assault and battery, however violent and unprovoked, for recovery of damages, that therefore a British subject is deprived of his right." Justices Williams and Crompton, however, expressly refrained from stating any opinion upon the point for the reason that it was not necessary to the determination of the case, and Justice Blackburn expressed his doubt whether the rule had been correctly stated by Justice Wightman.

Dicey, at page 662 of his work above referred to, says: "It
62 is hard to see why an Italian or an Englishman who assaults either an Italian subject or a British subject at Naples and does not thereby incur, under the law of Italy, liability to the payment of damages, should become liable to pay them when an action is brought against him in England. Italian law imposes no such liability, and English law does not extend to Italy."

An action brought in one of our States for damages resulting from a common law tort committed in another of our States may doubtless be maintained without proof of the lex loci. But where an action to recover damages for a wrongful act committed in another State is maintainable solely under some statutory authority of that State, and not under the common law, there the statutes of the State conferring the right of action must be both pleaded and proven by him who asserts the right. See Wooden vs. N. Y. & P. R. R. Co., 126 N. Y., 10, and Keep vs. National Tube Co., 154 Fed., 121. In the present case the right of action is not based on any statute of Cuba, and the defendant insists that the common law cannot be presumed to exist in Cuba, inasmuch as that country was formerly a Spanish colony.

But, as above stated, the defendant has filed the plea of the general issue only. The declaration alleges what, according to the lex fori, is actionable negligence on the part of the defendant. The defendant by pleading the general issue has not denied the legal sufficiency of the allegations of the declaration. If the lex loci delicti does not give to the plaintiff a right of action, that defense should have been presented by a special plea and supported by proofs offered by the defendant. I do not think it was obligatory on the part of the plaintiff to set forth in his declaration in express terms what the special law of the Republic of Cuba on the subject of actionable negligence may be. He had the right to set forth a cause of action which, according to the law of the forum, would be complete, and in the event of a conflict between the lex loci and the lex fori, the defendant ought to have shown by a proper plea that under the lex loci the plaintiff acquired no right of action.

In Scott vs. Lord Seymour, supra, the declaration alleged that the defendant assaulted and imprisoned the plaintiff. The defendant pleaded, first, that the trespasses were committed at Naples, out

of the jurisdiction of the Court, and that, according to the law of Naples, the defendant was not liable to be used by the plaintiff in any other civil action or other proceedings to recover damages for the alleged trespass. The second plea was to the effect that the trespasses were committed at Naples, that penal proceedings had been taken there, that by the law of Naples the plaintiff could not recover damages in a civil action or other proceeding in respect of the trespasses until the defendant had been condemned and found guilty of those trespasses; that at the time of the commencement of the suit
63 the proceedings in Naples were still pending and undetermined, and that the defendant had not been condemned or found guilty of the trespasses or any part thereof. On a demurrer to the pleas they were held to be insufficient. Mr. Justice Wightman, concerning the first of these pleas, said: "My learned brethren are of opinion that the plea does not contain any averment that damages might not be recovered by the law of Naples for the alleged trespass in some form of proceeding or other, and that it may be taken as against the defendant in the action that the pleas admit that they might be recovered; and that, if that be so, the question is one of procedure merely and governed by the lex fori, and that there is nothing to oust the jurisdiction of an English court to entertain an action to recover damages in such a case. I agree with the rest of the court, if the construction of the first plea is that which they suggest." It will be observed that it was not suggested that it was the duty of the plaintiff to allege and prove the lex loci, that is, the law of Naples; that seems to have been regarded as matter of defense to be averred and proven by the defendant. It is a well settled rule of pleading that if a court has not general jurisdiction of the subject matter of an action instituted before it, the defendant ought to plead to the jurisdiction and that he cannot take advantage of it upon the general issue. It was so declared by Lord Mansfield in the leading case of Mostyn vs. Fabrigas, supra.

In Dainese vs. Hale, 1 U. S., 13, it appears that an action ex delicto was brought in the Supreme Court of the District of Columbia to recover the value of chattels which the defendant, as consul-general of the United States in Egypt, there caused to be attached. The defendant pleaded that as such consul-general he was invested with judicial functions and power in the case, and that in the exercise of those functions he took cognizance of the cause referred to in the declaration and issued the attachment complained of. To this plea there was a general demurrer. The demurrer was overruled. The parties to the action before the consul-general were all citizens of the United States. Mr. Justice Bradley, after reviewing the acts and treaties relevant to the questions involved, and after reaching the conclusion that under those acts and treaties the consul-general had such jurisdiction in civil causes between citizens of the United States as was permitted by the laws of Turkey, or its usages in its intercourse with other Christian nations, said:

"But here we are met by a difficulty arising from the extreme generality of the defense set up in the plea. What are the laws of Turkey and its usages in its intercourse with other Christian nations

in reference to the powers allowed to be exercised by their public ministers and consuls in judicial matters? The plea does not inform us. It leaves the court to infer or take judicial knowledge of those laws and usages. But can it do this? Foreign laws and
64 usages are, as to us, matters of fact and not matters of law * * * As the power of the consuls of the United States, according to the treaties and laws as they stood in 1864, depended on the laws or usages of Turkey, those laws or usages should have been pleaded in some manner, however briefly, so that the Court could have seen that the case was within them; for failing to do this, the plea was defective in substance, and judgment should have been rendered for the plaintiff on the demurrer."

In The Scotland, 105 U. S., 24, Mr. Justice Bradley said (at page 29) that if a collision between British ships should occur in British waters, and the injured party should seek relief in our courts, we would administer justice according to the British law, so far as the rights and liabilities of the parties were concerned, provided it were shown what that law was, and that if it were not shown, we would apply our own law to the case.

In Ackerson v. Erie Railway Co., N. J. Law, 309, the action was brought in the New Jersey Supreme Court by the plaintiff against the defendant to recover for injuries received in a railroad accident on the defendant's railroad in the State of New York. The declaration was in the usual form and, being demurred to, the question raised was whether the plaintiff could maintain his action in New Jersey. The right of action was sustained on the settled principle that "personal injuries are of a transitory nature and sequentur forum rei."

In my judgment the objection that the plaintiff did not plead or prove what the law of Cuba is, is an invalid objection.

In the next place, it is urged that the verdict should be set aside and a new trial granted because of error in the charge of the Court to the jury. In the course of the trial the plaintiff testified that shortly after he entered the employment of the defendant he noticed that the governor of the engine sometimes failed to work properly and allowed the engine to run too fast. The first time he noticed it was probably three or four weeks after he entered the defendant's employment. He notified Mr. Knight, the master engineer and superintendent of the defendant's mechanical department, of the defect. The same trouble with the governor was observed by the plaintiff some three or four times within the period of six or seven months before the date of the accident. Each time the defect was reported by him to Mr. Knight. He says he explained to Mr. Knight on these different occasions that the governor was not working properly, and that it allowed the engine to run too fast. On Friday morning, June 15, 1906, the same difficulty occurred again. The governor failed to cut off the steam supply at the proper time, with the result that the engine "ran away," causing a vibration of the machinery and the raising of dust. The plaintiff says he noti-
fied Mr. Knight on that morning that the governor was not
65 working right. Being further examined as to what took place on that morning, the record shows the following questions and answers:

"Q. Now, come down to Friday, this Friday after you noticed something the matter with the engine,—you say you notified Mr. Knight; what did you tell Mr. Knight?

A. I told Mr. Knight that the governor was not working properly and I was afraid it would cause trouble and an accident, and the shafting and pulleys would not stand from the speed it was running, I was afraid.

Q. And what reply did you get to that, if any?

A. He said he thought there was no danger; that the governor was worn out, and that they would replace it with a new governor.

Q. Tell us all that you said to Mr. Knight and that he said to you on this Friday, the day before the accident. Where did you find him in the first place?

A. I found him over in the engine house at 9 o'clock or 10 o'clock in the forenoon."

* * * * * * *

"Q. Tell us all that you said to him and he to you, as near as you can recall it?

A. Well, I told him that the governor was not working right this morning again, and that I was afraid that it would cause trouble or an accident, and that the shafting and pulleys would not stand the speed when it turned loose that way, and he said that the governor was worn out and he would have it thoroughly overhauled or replace it with a new one as soon as possible; that the governor would have to do until they could do that, or had time to repair it; he told me to go on and do the work, that he didn't think there was any danger, and that he thought the pulleys and shafting would stand until they replaced the governor.

Q. Go ahead, tell us the whole story; was there anything further?

A. No, sir; I think that was all.

Q. What did you do then?

A. I went back to my work.

Q. You went back to your work?

A. Yes, sir."

In the course of the charge to the jury, after referring to the above testimony, I said: "If you believe that that statement of the plaintiff is free from error, that there is no mistake about it; if
66 you think he is telling the truth, the exact truth, and made no mistake in that respect, then the law is that the obvious risk which up to that moment had been his was lifted from his shoulders, because the man in charge of the business, who was the representative of the defendant company, to whom he was authorized to report, said to him, 'You go back to your work and I will have the thing attended to.' If that was what took place, and what Mr. Knight said, then the defendant company assumed the risk and lifted it from the plaintiff's shoulders for a reasonable period, that is, for such a period as would be a reasonable time for the defendant to make repairs to the governor; and after the expiration of that reasonable period, if the plaintiff continued to work there without

repairs, then the risk was revived as against him, and he assumed it again. You, therefore, have to settle on this branch of the case the question as to whether a reasonable time for repairing that governor had expired before the accident happened. You remember that the plaintiff says that he reported to Mr. Knight the defect in this governor on Friday morning, I think it was about 9 o'clock, and it appears that the accident happened about two or three o'clock the next afternoon, which was something over 24 hours afterwards. Ought the governor to have been repaired within that time? Had the reasonable time expired? If so, then no matter if Mr. Knight did make the promise that the plaintiff said he made on Friday morning, the obvious risk had revived as against the plaintiff, and he cannot recover, and you must conclude that he is guilty of contributory negligence."

Abstractly considered, the language of the charge above quoted stated broadly the rule as to the shifting of the risk of obvious danger from the servant to the master where the servant continues to work with a defective machine after a promise by the master to have it repaired, and a request by the master to the servant to continue with his work. It is true that even where a master requests his servant to continue his employment with a machine rendered dangerous by reason of its defects, the danger may be so grave and so imminent that no prudent man can continue to work with the machine without being guilty of contributory negligence. But after reflection, I have reached the conclusion that the language of the charge above quoted, as applied to the facts of the case in hand, is not objectionable. Ordinarily, a servant assumes the risk of danger which are obvious to him because of an implied agreement between him and his master. But if those obvious risks are due to defective machinery, and he complains of the defect to his master and the master promises to have the defect remedied and requests him to continue with his work, the implication is that until the promise is executed, or until the time within which it should be executed has expired, the master assumes the risks, unless, indeed, as above stated,
67 the peril is so grave and imminent that the servant cannot continue his work without being guilty of contributory negligence. But while it is true that the plaintiff in the present case had, the day before the accident, said to Mr. Knight that he was afraid there would be "trouble or an accident," the engine had run away several times before without injury to any one. The testimony shows that he was charged with the duty of starting and stopping the engine. It also shows, and on this point there is no dispute, that Mr. Knight requested him to continue with his work and that Mr. Knight did not think there was any danger in his doing so. I think the case is barren of any evidence showing, or tending to show, that the peril to the plaintiff was so great that he was either bound to abandon his work, and thereby perhaps cause the operations of the mill to be suspended until some other person could be secured to fill his place, or, in the event of injury to himself, be held remediless because of his contributory negligence. As I view the case the rule of Andrecsik v. New Jersey Tube Co., 73

N. J. Law, 664, and Dowd v. Erie Railroad Co., 70 N. J. Law, 451, was properly applied. I think, also, that there was nothing in the charge, as applied to this case, that can be held to be contrary to District of Columbia v. McElligott, 117 U. S., 621; Roccia v. Black Diamond Coal Mining Co., 121 Fed., 451; Cincinnati, &c., v. Robertson, 139 Fed., 519, or Crookston Lumber Co. v. Boutin, — Fed., 680.

It is also urged that the Court erred in not charging the jury, as requested by the defendant, that "if the jury find that the plaintiff put himself in the way of the racing engine with knowledge of its character, the verdict must be for the defendant." There was no evidence that the plaintiff put himself in the way of the racing engine unless it be his own testimony. He says that on the afternoon of June 16, he was in the filing room when the engine broke loose and began to run away. His place in that room was about seventy feet distant from the engine and he could see it from where he stood. He says that as he looked over the engine he saw Mr. Bonet standing by it, evidently trying to stop it, and that, as Mr. Bonet did not seem to be succeeding in his efforts, he, the plaintiff, ran over to see if he could stop it. Just as he got to the engine the pulleys overhead burst and a piece of one of them struck his hand, causing injury which necessitated its amputation. To hold the plaintiff guilty of contributory negligence in such circumstances, it seems to me, would be most unreasonable. He was the man who had charge of the engine, and in his effort to protect property and life he rushed to the engine to stop it. His action was commendable and in the discharge of a plain duty, and under the circumstances could there be from such conduct the inference of contributory negligence.

The defendant contends, too, that the verdict is excessive. It was for $6,000. The plaintiff is thirty years old. At the time of the accident he was earning $125 per month, or $1,500 a year.
68 In Dowd v. Erie Railroad Co., supra, the plaintiff lost his right hand. He was 38 years old and earned only between eight and nine dollars a week. The verdict was for $5,500. The Court said: "We cannot say that the damages are excessive. It is said that $5,500 paid to a man thirty-eight years old and invested at five per cent would produce an annuity for his life of $379, an amount about equal to his earnings. It is not contended that $5,500 would buy an annuity of that amount, and in view of the prevailing rate of interest it is hardly likely that the plaintiff could count upon as high a rate as five per cent. This calculation leaves out of account any compensation for pain and suffering. The loss of a right hand to a laboring man in the prime of life is a very serious loss, and an award of $5,500 does not, to say the least, seem so extravagant that the Court would be justified in interfering with the verdict." My conclusion is that the verdict cannot be disturbed on the ground that it is excessive.

Lastly, it is said that the verdict is contrary to the weight of evidence and to the law. I have said all that need be said on the point as to whether it is contrary to law. As to whether it is contrary to

the weight of evidence, I am satisfied that the case was a fair one for the jury and that the verdict cannot be disturbed on that ground.

But the jurisdiction here depends upon proper diversity of citizenship. It is essential that such citizenship be affirmatively averred. In his declaration the plaintiff avers that he is a "resident of the City of Dickson, in the State of Tennessee," and that the defendant is "a corporation organized under and by virtue of the laws of the State of New Jersey." There is no other averment as to the citizenship of either of the parties. The plaintiff testifies that he lives "at present in Cuba." There is no other proof on the point of his citizenship. The averment that the defendant is "a corporation organized under and by virtue of the laws of the State of New Jersey," has been held to be in legal effect an averment that it is a citizen of the State of New Jersey. Block v. Standard Distilling and Distributing Co., 95 Fed., 978. But the averment that the plaintiff is a "resident of the City of Dickson, in the State of Tennessee," is insufficient. An averment of residence is not the equivalent of an averment of citizenship for the purpose of securing jurisdiction in the courts of the United States. Wolfe v. Hartford Life Insurance Co., 148 U. S., 389. Although this defect in the declaration was not referred to on the argument of this rule the court cannot overlook it. In Horne v. George H. Hammond Co., 155 U. S., 393, where the allegation was in substance the same as in the declaration in the present suit, the judgment of the trial court was reversed on the sole ground that the transcript of the record did not show that the trial court had jurisdiction of the suit. But I do not think I ought to dismiss the case at present on this ground.

69

I have no reason to believe that proper diversity of citizenship does not in fact exist. Opportunity should be given to the plaintiff to show such diversity and to amend his declaration if the facts will warrant the amendment. The court has the power, at any stage of the case, to make inquiry concerning the citizenship of a party. Hartog v. Memory, 116 U. S., 590. The plaintiff may enter a rule to take depositions on this point, with leave to the defendant to take answering depositions thereto. After such depositions are taken application may be made to the court for leave to amend the declaration. Instead of adopting this course, however, if the defendant shall, after inquiry, be satisfied that such diversity of citizenship exists as gives jurisdiction to the court, the declaration may be amended on the defendant's consent and thus save the time and expense of taking depositions. The entry of judgment upon the verdict must be postponed until after the question concerning the amendment of the declaration shall have been decided.

W. M. LANNING, *Judge.*

Endorsed: United States Circuit Court, District of New Jersey. Walter E. Crosby, vs. Cuba Railroad Company. Opinion. Filed January 2, 1908. H. D. Oliphant, Clerk.

United States Circuit Court, District of New Jersey.

WALTER E. CROSBY
v.
CUBA RAILROAD COMPANY.

Pursuant to the suggestion contained at the end of the Court's opinion in this case, published in 158 Federal Reporter at page 144, and on due notice given, the present deposition of the plaintiff is taken on a motion by the plaintiff to amend his declaration in such manner as to show proper diversity of citizenship, a respect in which the declaration, as filed, was defective. The said deposition is taken before Honorable William M. Lanning, the Judge who delivered the opinion, on this eighteenth day of April, A. D. nineteen hundred and eight, at his chambers in the Government Building at Trenton, New Jersey, in the presence of Mr. Benjamin M. Weinberg, attorney for the plaintiff, and Mr. Charles D. Miller, appearing as attorney for the defendant.

70 WALTER E. CROSBY, being duly sworn, deposes and says, on direct examination by Mr. Weinberg:

Q. Mr. Crosby, where were you born?
A. In the State of Wisconsin.
Q. In what city or town?
A. I was born in Lafayette County, Wisconsin, in the country, not in the city, I guess.
Q. When?
A. In 1877.
Q. How long did you live in Wisconsin?
A. Until I was about seven years old, I think.
Q. Where did you remove to after that?
A. First to Chicago, and then to Tennessee.
Q. What year did you remove to Tennessee, as near as you can remember; or about how old were you?
A. About eight years old when I moved to Tennessee.
Q. Did you become of age in Tennessee?
A. Yes, sir.
Q. Did you acquire the right to vote in Tennessee?
A. Yes, sir.
Q. Did you vote in Tennessee?
A. Yes, sir.
Q. How long did you continue to live in Tennessee; until about what year?
A. Until 1900.
Q. Are you married?
A. Yes, sir.
Q. Where were you married?
A. Dickson, Tennessee.

By the COURT:

Q. In what county is that?
A. Dickson County.

By Mr. WEINBERG:

Q. How long did you reside there after your marriage?
A. Why, about six months.
Q. And then you removed where?
A. To Cuba.
Q. What point in Cuba?
A. To Louglario, first.
71 Q. Who went with you?
A. My wife and father went with me at the time.
Q. What was your purpose in going to Cuba?
A. I went down on account of my health.

By the COURT:

Q. Did you live always in one place in the State of Tennessee?
A. Yes sir; I never lived anywhere else only Dickson.
Q. How many years did you live in Tennessee at Dickson?
A. About fourteen years.
Q. How old were you when you removed from Tennessee to Cuba?
A. Twenty-two.
Q. Did you leave in Dickson, when you removed to Cuba, any of your family or relatives?
A. Yes, sir; all my family were in Dickson.
Q. Who?
A. All my father's family.
Q. I thought you said your father moved with you to Cuba?
A. He came on a trip to Cuba. He went right back.
Q. Up to the time that you went from Dickson to Cuba where had you been living; that is, in what house in Dickson?
A. In my father's house.
Q. Did you take your wife to your father's house?
A. Yes, sir.
Q. How long before you removed from Dickson to Cuba were you married?
A. I was married in July and went to Cuba the next February.
Q. Does your father still live in Dickson?
A. Yes, sir.
Q. In the same house where he lived when you removed to Cuba?
A. No, sir; he lives in a different house.
Q. Well, he lives in the same town?
A. The same town.
Q. Have you ever voted in Cuba?
A. No, sir.
Q. Have you ever become a citizen of Cuba, by naturalization or otherwise?
A. No, sir.

By Mr. WEINBERG:

Q. For what purpose was Cuba selected when you left Tennessee?

72 A. On account of my health, being a warmer climate.

Q. You wanted to seek a warmer climate?

A. Yes, sir.

Q. Did your health improve in Cuba?

A. Yes, sir.

Q. Had you at any time, from the time you moved to Cuba until prior to the bringing of the action, attempted to leave Cuba permanently?

A. Yes, sir; we had arranged to leave Cuba just a week before the action was commenced. We had packed up to go back to Tennessee.

Q. And after the accident and about the time this suit was brought, in the month of December, 1906, where were you?

A. In Tennessee.

Q. And when had you arrived in Tennessee; what month?

A. In November some time, I think.

Q. And when did you return to Cuba?

A. In the latter part of January.

Q. 1907?

A. Yes, sir.

Q. Have you lived continuously in one place in Cuba?

A. No, sir.

Q. Where have you lived at different times?

A. I lived first in the town of Louglario; later in the town of Riverside, and later in Camaguey, and then in Bartle.

Q. Have you acquired any political rights whatever in Cuba?

A. No, sir.

Q. Was it your intention when you left Tennessee to make Cuba your per*nam*ent residence?

A. No, sir.

Q. Is it your intention now to remain in Cuba permanently?

A. No, sir.

Q. Has your wife any property or lands, or have you any property or lands in Tennessee?

A. My wife has some property there.

Q. How long has she had that property there?

A. Since she came of age.

Q. About how many years?

A. About eight years.

Q. And it remains unsold?

73 A. Yes, sir.

Q. Have you found your health restored to any degree since you left this country?

A. Yes, sir.

Q. To what extent are you restored?

A. I am practically well, I think.

Q. So that you had intended to move back to the States?

A. Yes, sir.

Q. Is it your intention to come back to the States?
A. Yes, sir.
Q. When do you expect to put that intention into actual operation?
A. Why just as soon as we get the money and get able to make the move we intend to move back.
Q. And you have some prospects of getting the money to move back with?
A. Yes, sir.
Q. Has your wife any family in Cuba?
A. No, sir.

Cross-examination:

By Mr. MILLER:

Q. Is your father in Cuba?
A. No, sir.
Q. Didn't he run a mill at Bartle?
A. Yes, sir.
Q. Did he bring any of the rest of his family there?
A. I had one brother there.
Q. Does he intend to go back to Cuba?
A. He has talked some of going back to Cuba, but he is undecided about it.
Q. Did you ever vote in Tennessee?
A. Yes, sir.
Q. At what election?
A. A county election, only.
Q. What is your age?
A. Thirty years old.

By the COURT:

Q. Mr. Crosby, in 1906, where did you claim your permanent home and domicile to be; what place did you look upon as your home?
A. We have always called Dickson, Tennessee, our home.

74 It is stipulated and agreed by the respective counsel that the signature of the plaintiff, Walter E. Crosby, to the above deposition may be waived. Said deposition was taken before me after the said plaintiff had been duly sworn according to law, on this eighteenth day of April, A. D. nineteen hundred and eight.

W. M. LANNING, *Judge.*

By Mr. WEINBERG: I now apply to the Court for leave to strike out from the plaintiff's declaration filed in this case the words commencing on the third line as follows: "Walter E. Crosby, resident of the City of Dickson, in the State of Tennessee," and to insert in their place the words, "Walter E. Crosby, a citizen of the State of Tennessee, in the United States of America."

By Mr. MILLER: I object to this amendment because I insist that

this new issue should have been submitted to the jury on the trial of the cause before them.

By the COURT: The objection is overruled because, in the judgment of the Court, the question is one for its determination, no objection to the jurisdiction of the Court for want of proper diversity of citizenship having been raised by any plea or other objection on the part of the defendant.

By Mr. MILLER: I pray for an exception to the Court's ruling.

By the COURT: I do not think counsel for the defendant is entitled to an exception on this point. Nevertheless, I will sign an exception to the end that the counsel for the defendant may have the case in shape for review by the proper reviewing tribunal, if the matter be a reviewable one, upon an exception. The exception is therefore hereby granted and is accordingly sealed.

W. M. LANNING, [SEAL.]
Judge.

By Mr. WEINBERG, for the plaintiff: I desire to move at this time that if the Court concludes from the evidence just taken that the plaintiff was at the time of the commencement of this suit a citizen or subject of the Cuban Republic, that the plaintiff's declaration may be so amended.

75 By the COURT: In my judgment, the plaintiff must aver either that he is a citizen of the State of Tennessee or that he is a citizen of the Republic of Cuba. He has testified that he claims his home and domicile at Dickson, in the State of Tennessee. The proper amendment therefore is that he should aver his citizenship to be in the State of Tennessee. It is true that if his testimony showed that he claimed his citizenship to be in the Republic of Cuba, I would allow an amendment setting up that citizenship. Whether his citizenship be in Tennessee or in Cuba, in either event, the Court has jurisdiction, inasmuch as the defendant is a citizen of New Jersey. The motion, however, must be denied because the testimony does not show that the plaintiff is a citizen of the Republic of Cuba.

By Mr. WEINBERG: I now present to the Court an order granting leave to the plaintiff to amend his declaration by striking out the words commencing on the third line thereof as follows: "Walter E. Crosby, resident of the City of Dickson, in the State of Tennessee," and inserting in their place the words "Walter E. Crosby, a citizen of the State of Tennessee, in the United States of America," and also ordering that the plaintiff have leave to enter judgment on the verdict heretofore rendered in the said cause.

By the COURT: Such motion is granted and the order will be at once signed.

By Mr. MILLER: I respectfully pray an exception to the ruling of the Court granting the last mentioned motion, on the ground that the Court is without jurisdiction to amend the declaration by inserting a material allegation therein after the trial by the jury.

By the COURT: The exception is allowed and is hereby accordingly sealed.

W. M. LANNING, [SEAL.]
Judge.

76 United States Circuit Court, District of New Jersey.

In Tort.

Order.

WALTER E. CROSBY, Plaintiff,
vs.
CUBA RAILROAD COMPANY, Defendant.

An order to take testimony in the above said cause for the purpose of establishing the citizenship of the said plaintiff having heretofore been made, and the said plaintiff having appeared in open court, this eighteenth day of April, A. D. 1908, and given his testimony from which it satisfactorily appears to the Court that the said plaintiff was, at the time of the commencement of his said suit against the said defendant, a citizen of the United States, and more particularly a citizen of the State of Tennessee.

It is thereupon ordered, this eighteenth day of April, A. D. 1908, that the plaintiff's declaration be and the *same* is hereby amended, by striking out the words commencing on the third line as follows: "Walter E. Crosby, resident of the City of Dickson, in the State of Tennessee" and inserting in their place the words, "Walter E. Crosby, a citizen of the State of Tennessee, in the United States of America."

And it is further ordered that the said plaintiff have leave to enter judgment on the verdict heretofore rendered in the said cause.

W. M. LANNING, *Judge.*

On motion of Benjamin M. Weinberg, Attorney of Plaintiff.

Endorsed: United States Circuit Court, for the District of New Jersey. Walter E. Crosby vs. Cuba Railroad Company. In Tort. Order. Benjamin M. Weinberg, Attorney of Plaintiff, 738 Broad Street, Newark, N. J. Filed April 18, 1908. H. D. Oliphant, Clerk.

77 United States Circuit Court, District of New Jersey.

In Tort.

WALTER E. CROSBY
vs.
CUBA RAILROAD COMPANY.

Rule for Judgment Final.

It is, on this eighteenth day of April, nineteen hundred and eight, Ordered that judgment final be entered in the above-stated cause, in favor of the plaintiff and against the defendant for six thou-

sand dollars ($6,000), besides costs of suit to be taxed, and that execution issue, etc.

On motion of Benjamin M. Weinberg, Plaintiff's Attorney.

Let this rule be entered in the minutes of the Court.

W. M. LANNING, *Judge.*

Endorsed: United States Circuit Court, District of New Jersey. Walter E. Crosby vs. Cuba Railroad Company. In Tort. Rule for Judgment final. Filed April 18, 1908. H. D. Oliphant, Clerk.

United States Circuit Court, District of New Jersey.

WALTER E. CROSBY, Plaintiff,
against
CUBA RAILROAD COMPANY, Defendant.

Petition for Writ of Error.

To the Honorable Judges of the United States Circuit Court of Appeals for the Third Judicial Circuit:

Comes now the above-named defendant, Cuba Railroad Company, by Samuel D. Oliphant, Jr., its attorney, and complains that
78 in the record and proceedings had in said cause in the Circuit Court of the United States, in and for the District of New Jersey, in the trial of said cause, in the Circuit Court of the United States herein, for the District of New Jersey, the verdict of the jury therein, on November 8, 1907, and the denial of defendant's motion for a new trial, and the rendition of judgment in the above-entitled cause in said United States Circuit Court, District of New Jersey, on April 18, 1908, manifest error happened; to the great damage of defendant.

Wherefore said defendant prays for the allowance of a writ of error, and for such orders and processes as may cause all and singular the record and proceedings in said cause to be sent to the said Circuit Court of Appeals, so that the same may be inspected and the Judges of said Court may cause further to be done therein to correct that error what of right according to law ought to be done, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error.

And your petitioner will ever pray.

Dated Trenton, April 27, 1908.

S. D. OLIPHANT, JR.,
Attorney for Plaintiff in Error and Defendant,
132 *East State Street, Trenton, N. J.*

HOWARD MANSFIELD, *Of Counsel.*

Endorsed: United States Circuit Court, District of New Jersey. Walter E. Crosby, Plaintiff, against Cuba Railroad Company, Defendant. Petition for Writ of Error. Samuel D. Oliphant, Jr., Attorney for Defendant, 132 East State Street, Trenton, N. J. Filed May 11, 1908. H. D. Oliphant, Clerk.

United States Circuit Court, District of New Jersey.

WALTER E. CROSBY, Plaintiff,
vs.
CUBA RAILROAD COMPANY, Defendant.

Now comes the defendant, Cuba Railroad Company, by Samuel D. Oliphant, Jr., its attorney, and with its petition for a writ of
79 error, files the following assignments of error, upon which it will rely in the prosecution of the writ of error in the above-entitled cause:

I. That the United States Circuit Court, in and for the District of New Jersey, erred in denying the motion of counsel for the defendant, the plaintiff in error, at the close of the case, to dismiss the declaration or to direct the jury to bring in a verdict for defendant on the evidence presented by the plaintiff and defendant, upon the following grounds:

1. That the plaintiff has not shown any negligence on the part of the defendant, either in the maintenance of its machinery or in the selection of its servants.

2. On the ground that the defendant showed no negligence in retaining Mr. Bonet as a foreman to assist the plaintiff, inasmuch as he was engaged and retained at the plaintiff's request.

3. On the ground that the plaintiff cannot recover, by reason of his contributory negligence, for it was the duty of the plaintiff to look after the engine, and if the same was out of order, it was his duty to have it repaired. His failure to do so constituted negligence.

4. That the plaintiff cannot recover by reason of his contributory negligence, for, if the foreman, Bonet, was incompetent, it was his duty to have him discharged, and his retention of an incompetent foreman constituted contributory negligence.

5. On the ground that the plaintiff's statement and the evidence shows that he was in a safe place at the time of the accident, and that he voluntarily placed himself in a position which he knew was dangerous.

II. The said Court erred in denying the motion of counsel for the defendant, the plaintiff in error, at the close of the case, to dismiss the declaration, on the following grounds:

That the Court has not jurisdiction of the alleged cause of action, because the alleged tort upon which this action was brought, took place in Cuba, as appears by the declaration, and the plaintiff is not a resident of New Jersey, but is a resident of Cuba, and the defendant, while a New Jersey corporation, owns and operates a large plant in Cuba; that the Court should not take jurisdiction of this action, for it is brought on a cause of action alleged to have arisen in Cuba, and there has been no allegation or proof that under the lex loci delicti the acts alleged gave this plaintiff any right of action against the defendant, and the Court should not take jurisdiction on the presumption that the common law prevails in Cuba, for Cuba has not

been settled by England or English colonies, and there is no presumption that the common law prevails.

III. That said Court erred in refusing to give the jury the following instructions, as requested by defendant, plaintiff in error:

"If the jury finds that the plaintiff put himself in the way of
80 a racing engine, with knowledge of its character, the verdict must be for defendant."

IV. That said Court erred in instructing the jury that if the jury believed the story of the plaintiff that on Friday morning, before the accident, he reported to Knight that the governor was defective, and that he feared an accident, and that Knight said that he thought that the engine was safe, the obvious risk was lifted from his shoulders, and the defendant company assumed the risk and lifted it from the plaintiff's shoulders for a reasonable period, as appears in the following instructions given during the charge to the jury:

"But he (Crosby) says: 'When I told Mr. Knight that this machine was out of order, that this governor was not working properly and that I feared that there would be an accident, or something to that effect, he said Mr. Knight replied, "I don't think there is much danger, or any danger; you go back to work; the governor is an old governor; there ought to be a new one, and I will have it attended to shortly," or something to that effect.' I don't pretend to recall the exact words, and you must depend on your memory and not mine for them, but that, as I recalled it, is what the plaintiff says Mr. Knight replie- to him. If you believe that the statement of the plaintiff is free from error, that there is no mistake about it; if you think he is telling the truth, the exact truth, and made no mistake in that respect, then the law is that the obvious risk which up to that moment had been his was lifted from his shoulders because the man in charge of the business, who was the representative of the defendant company, to whom he was authorized to report, said to him, 'You go back to your work and I will have the thing attended to.' If this was what took place and what Mr. Knight said, then the defendant company assumed the risk and lifted it from the plaintiff's shoulders for a reasonable period, that is, for such a period as would be a reasonable time for the defendant to make repairs to the governor; and after the expiration of that reasonable period, if the plaintiff continued to work there without repairs, then the risk was revived as against him, and he assumed it again."

V. That said Court erred in overruling and denying the motion of counsel for defendant, the plaintiff in error, to set aside the verdict, and for a new trial, on the following grounds:

1. That the verdict was contrary to the weight of evidence.
2. That the verdict was contrary to law.
3. That the damages given the plaintiff by said verdict are excessive.
4. On the exception of the defendant to the charge of the Court.
5. On the exception of the refusal of the Court to charge, "If the jury find that the plaintiff put himself in the way of a racing
81 engine, with knowledge of its character, the verdict must be for the defendant," and on all other exceptions.

VI. That said Court erred in overruling and denying the motion of counsel for the defendant, plaintiff in error, made on December 2, 1907, to dismiss the action on the following grounds:

1. That the Court has not jurisdiction of the alleged cause of action, because the alleged tort upon which this action is brought took place in Cuba, as appears by the declaration; and the plaintiff is not a resident of New Jersey, but is a resident of Cuba; and the defendant, while a New Jersey corporation, owns and operates a large plant in Cuba.

2. The Court should not take jurisdiction of this action, for it is brought on a cause of action alleged to have arisen in Cuba, and there has been no allegation or proof that under the lex loci delicti the acts alleged give this plaintiff any right of action against the defendant.

3. The Court should not take jurisdiction on the assumption that the common law prevails in Cuba, for Cuba has not been settled by England or English colonies, and there is no presumption that the common law prevails there.

VII. That said court erred in allowing said plaintiff, the defendant in error, to take depositions as to his citizenship subsequent to the trial of this action and the verdict of the jury.

VIII. That said Court erred in granting the motion of plaintiff, defendant in error, that the plaintiff's declaration be amended by striking out the words commencing on the third line, as follows: "Walter E. Crosby, resident of the City of Dickson in the State of Tennessee," and inserting in their place, "Walter E. Crosby, a citizen of the State of Tennessee, in the United States of America."

IX. Said Court erred in entering judgment upon the verdict.

Wherefore said Cuba Railroad Company, plaintiff in error, prays that the judgment of the Circuit Court of the United States for the District of New Jersey be reversed, and that said action be dismissed; or, if the action be not dismissed, that said Circuit Court be directed to grant a new trial on said alleged cause of action to said Cuba Railroad Company.

Trenton, April 27, 1908.

S. D. OLIPHANT, JR.,
Attorney for Plaintiff in Error and Defendant,
132 *East State Street, Trenton, N. J.*

82 Endorsed: U. S. Circuit Court, District of New Jersey. Walter E. Crosby, Plaintiff, against Cuba Railroad Company, Defendant. Assignments of Error. Samuel D. Oliphant, Attorney for plaintiff in error and defendant, 132 East State St., Trenton, N. J. Filed May 11, 1908. H. D. Oliphant, Clerk.

At a Stated Term of the Circuit Court of the United States of America in and for the District of New Jersey, Held at the United States Court and Post Office Building, in the City of Trenton, State of New Jersey, on the Eleventh Day of May, 1908.

Present: Hon. William M. Lanning, Circuit Judge.

WALTER E. CROSBY, Plaintiff,
against
CUBA RAILROAD COMPANY, Defendant.

On reading and filing the foregoing petition for a writ of error and the assignment of error,—Now, on motion of Samuel D. Oliphant, Jr., attorney for defendant, it is

Ordered that a writ of error be and hereby is allowed, to have reviewed in the United States Circuit Court of Appeals, for the Third Circuit, the record and proceedings heretofore had herein, the order denying defendant's motion to dismiss for want of jurisdiction and the judgment entered herein on the 18th day of April, 1908; and it is further

Ordered that said defendant file a bond, as provided by statute; and the amount of bond on said writ of error be and the same is hereby fixed at the sum of twelve thousand dollars, to operate as a supersedeas.

W. M. LANNING,
U. S. Judge.

Endorsed: U. S. Circuit Court, District of New Jersey. Walter E. Crosby, Plaintiff, vs. Cuba Railroad Company, Defendant. Order for Writ of Error. Samuel D. Oliphant, Jr., Attorney for defendant, 132 East State St., Trenton, N. J. Filed May 11, 1908. H. D. Oliphant, Clerk.

83

American Surety Company of New York.
Capital and Surplus, $5,000,000.

United States Circuit Court, District of New Jersey.

WALTER E. CROSBY, Plaintiff,
against
CUBA RAILROAD COMPANY, Defendant.

Know all men by these presents that we, Cuba Railroad Company and American Surety Company of New York are held and firmly bound unto the above-named plaintiff, Walter E. Crosby, in the sum of twelve thousand dollars ($12,000.00), to be paid to the said Walter E. Crosby, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our successors, jointly and severally, firmly by these presents. Sealed with our seals, and dated this 25th day of April, 1908.

Whereas, the above-named Cuba Railroad Company has prose-

cuted a writ of error to the United States Circuit Court of Appeals, for the Third Judicial Circuit, to reverse the judgment rendered in the above-entitled suit by the Judge of the Circuit Court of the United States, for the District of New Jersey.

Now, therefore, the condition of this obligation is such that if the above-named Cuba Railroad Company shall prosecute the said writ of error to effect, and answer all damages and costs if it shall fail to make its plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

Sealed and delivered, and taken and acknowledged before me this — day of April, 1908.

[SEAL.] AMERICAN SURETY COMPANY OF NEW YORK,
By RICHARD DEMING,
Resident Vice-President.

Attest:
WM. H. BISHOP,
Resident Assistant Secretary.

[SEAL.] THE CUBA RAILROAD COMPANY,
By GERALD L. HOYT,
Vice-President.

84 STATE OF NEW YORK,
County of New York, ss:

On the 27th day of April, in the year 1908, before me personally came Gerald L. Hoyt, to me known, who being by me duly sworn, did depose and say: that he resided in Staatsburgh, N. Y., that he is the Vice-President of Cuba Railroad Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation and that he signed his name thereto by like order.

[L. S.] ALBERT L. WICKERT,
Notary Public, New York County. Registry No. 639.

STATE OF NEW YORK,
County of New York, ss:

I, Peter J. Dooling, Clerk of the County of New York, and also Clerk of the Supreme Court for the said county, the same being a Court of Record, do hereby certify, that Albert L. Wickert, whose name is subscribed to the Certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such proof and acknowledgment, a notary public in and for said county, duly commissioned and sworn, and authorized by the laws of said State to take acknowledgments and proofs of deeds or conveyances for land, tenements or hereditaments in said State of New York. And further, that I am well acquainted with the handwriting of such notary public, and verily believe that the signature to said certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 28th day of April, 1908.

[L. S.] PETER J. DOOLING, *Clerk.*

STATE AND COUNTY OF NEW YORK, *ss:*

On this 25th day of April, 1908, before me personally appeared Richard Deming, Res. Vice-President of the American Surety Company of New York, to me known, who being by me duly sworn, did depose and say that he resided in the city of Ossining, New
85 York; that he is the Res. Vice-President of the American Surety Company, of New York, the Corporation described in and which executed the above instrument; that he knew the corporate seal of said Corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said Corporation do not exceed its assets as ascertained in the manner provided by law. And the said Richard Deming, further said that he was acquainted with Wm. H. Bishop, and knew him to be the Res. Ass't. Secretary of said Corporation; that the signature of said Wm. H. Bishop, subscribed to the said instrument is in the genuine handwriting of the said Wm. H. Bishop, and was thereto subscribed by the like order of the said Board of Directors, and in the presence of him the said Richard Deming, Res. Vice-President.

[L. S.] R. J. DORMER,
Notary Public, Kings County.

Certificate filed in New York County.

At a regular quarterly meeting of the Board of Directors of the American Surety Company, of New York, held on the 12th day of April, 1893, the following Resolution was adopted and is still in full force and effect, to wit:

"Resolved, that the President and Vice-President be, and they hereby are, and each of them is authorized and empowered to execute and deliver and attach the seal of the Company to any and all bonds and undertakings for, or on behalf of the Company, in its business of guaranteeing the performance of contracts other than insurance policies, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings by law allowed; such guarantee, bonds and undertakings, however, to be attested in every instance by the Secretary, one of the Assistant Secretaries, or one of the attorneys."

COUNTY OF NEW YORK, *ss:*

I, Wm. H. Bishop, Res. Ass't. Secretary of the American Surety Company, of New York, have compared the foregoing Resolution with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom and of the whole of said original Resolution.

Given under my hand and the seal of the Company, at the City of New York, this 25th day of April, 1908.

[L. S.] WM. H. BISHOP,
Resident Asst. Secretary.

86 STATE OF NEW YORK,
County of New York, ss:

I, Peter J. Dooling, Clerk of the County of New York, and also Clerk of the Supreme Court for the Said County, the same being a Court of Record, Do Hereby Certify that W. J. Dormer, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such proof and acknowledgment, a Notary Public acting in and for said County, duly commissioned and sworn, and authorized by the laws of said State to take the acknowledgments and proofs of deeds or conveyances for land, tenements or hereditaments in said State of New York. And further, that I am well acquainted with the handwriting of such Notary Public, and verily believe that the signature to said certificate of proof or acknowledgment is genuine.

In Testimony Whereof I have hereunto set my hand and affixed the seal of the said Court and County the 28th day of April, 1908.

[L. S.] PETER J. DOOLING, *Clerk.*

American Surety Company of New York.

Incorporated April 14, 1884.

General Offices, 100 Broadway.

Financial Statement, Dec. 31, 1907.

Resources.

Real Estate (Home Office Building and Land, unencumbered	$3,000,000.00)	
(N. Y. City Water Front, unencumbered.	156,337.64)	
		$3,156,337.64
Stocks and Bonds, Market Value.....		2,433,891.91
Cash in Banks and Offices.....		562,124.09
Premiums in Course of Collection.....		187,457.99
Accrued Interest and Rents.....		25,530.84
		$6,365,342.47

87 Liabilities.

Capital Stock.....	$2,500,000.00
Surplus.....	2,119,013.39
Reserve for Reinsurance.....	1,126,946.11
Reserve for Contingent Claims.....	503,868.96
Bills and Accounts Payable, not due.....	115,514.01
	$6,365,342.47

In addition to the above Resources the Company owns:

Real Estate, unencumbered—in various places—of the value of	$110,000.00
Advances secured by Collateral	191,420.76
Deposits in suspended Banks ($241,198.70) on which will be realized not less than	210,070.52
	$511,491.28

STATE OF NEW YORK,
County of New York, ss:

Wm. H. Bishop, being duly sworn, says: That he is a resident Assistant Secretary of the American Surety Company, of New York, that said company is a corporation duly created existing and engaged in business as a surety company under and by virtue of the laws of the State of New York, and has duly complied with all the requirements of the laws of said State applicable to said company, and is duly qualified to act as surety under such laws. That said Company has also duly complied with and is duly qualified to act as surety under the Act of Congress of August 13, 1894, entitled "An Act relative to recognizances, stipulations, bonds and undertakings and to allow certain corporations to be accepted as surety thereon;" that the within is a true copy of the last statement of the assets and liabilities of said Company as rendered pursuant to section 4 of said Act of Congress; that said statement is true and that said American Surety Company, of New York, is worth more than $4,500,000 over and above all its debts and liabilities and such exemptions as may be allowed by law.

WM. H. BISHOP.

Subscribed and sworn before me this 25th day of April, 1908.
[L. S.] W. J. DORMER,
Notary Public, Kings County.

Certificate filed in New York County.

88 STATE OF NEW YORK,
County of New York, ss:

I, Peter J. Dooling, Clerk of the County of New York, and also Clerk of the Supreme Court for said County, the same being a Court of Record, Do Hereby Certify, That W. J. Dormer, has filed in the Clerk's Office of the County of New York, a certified copy of his appointment and qualification as Notary Public for the County of Kings, with his autograph signature, and was at the time of taking the annexed deposition, duly authorized to take the same, and that I am well acquainted with the handwriting of said Notary Public, and believe that the signature to the annexed certificate is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 28th day of Apr. 1908.

[L. S.] PETER J. DOOLING, *Clerk.*

Endorsed: United States Circuit Court, District of New Jersey. Walter E. Crosby vs. Cuba Railroad Company. Bond. Approved. W. M. Lanning, Judge. Filed May 11, 1908. H. D. Oliphant, Clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the District of New Jersey, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment in a plaint which was in the said Court, before you or some of you, between Walter E. Crosby, plaintiff and Cuba Railroad Company, defendant, of a plea of tort, a manifest error hath intervened, to the great damage of the said Cuba Railroad Company, as by their complaint appears, we being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Third Circuit, so that you have the same at the City of Philadelphia, in the State of Pennsylvania, on the Ninth day of June next, in the said United States Circuit Court of Appeals for the Third Circuit, to be then and there held, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Third Circuit may cause further
89 to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, at Trenton, this Eleventh day of May in the year of our Lord one thousand nine hundred and eight.

[SEAL.] H. D. OLIPHANT, *Clerk.*

UNITED STATES OF AMERICA, *ss:*

To Walter E. Crosby, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Third Circuit, to be holden in the City of Philadelphia, in the State of Pennsylvania, on the Ninth day of June, Nineteen hundred and eight, pursuant to a writ of error filed in the office of the clerk of the Circuit Court of the United States for the third circuit and district of New Jersey, wherein the Cuba Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable William M. Lanning, one of the judges of the Circuit Court of the United States for the District of New Jersey, this eleventh day of May, 1908.

W. M. LANNING, *Judge.*

Service of the within citation is hereby acknowledged.

BENJAMIN M. WEINBERG,
Attorney for Defendant in Error.

May 12, '08.

Endorsed: United States Circuit Court, District of New Jersey. Walter E. Crosby, Plaintiff, against Cuba Railroad Company, Defendant. Citation. H. D. Oliphant, Jr., Attorney for Defendant. Filed May 18, 1908. H. D. Oliphant, Clerk.

90 United States Circuit Court, District of New Jersey.

In Tort.

WALTER E. CROSBY, Plaintiff,
vs.
CUBA RAILROAD COMPANY, Defendant.

Order Extending Time to File Transcript.

Forasmuch as it has been represented to me that the time allowed by the rules of the United States Circuit Court of Appeals, for the Third Circuit, for the filing of a transcript of the record of the above entitled cause is not sufficient to allow the Clerk to conveniently prepare such transcript, and said Clerk has applied to me for an extension of said time, and because no prejudice can result from the granting of said extension:

Therefore, it is, on this ninth day of June, nineteen hundred and eight, ordered that the time limited by said rules for the filing of said transcript be and hereby is extended until the ninth day of July, nineteen hundred and eight.

W. M. LANNING, *Judge.*

United States Circuit Court, District of New Jersey, Walter E. Crosby, Plaintiff, vs. Cuba Railroad Company, Defendant. In Tort. Order Extending Time to File Tra-script. Filed June 9th, 1908. —— ——, Clerk.

Clerk's Certificate.

UNITED STATES OF AMERICA,
District of New Jersey, ss:

I, Henry D. Oliphant, Clerk of the Circuit Court of the United States for the District of New Jersey, do hereby certify that the foregoing is a full true and complete transcript of the record in the case of Walter E. Crosby vs. Cuba Railroad Company, as the same remains of record and on file in my office.

91 & 92 In witness whereof I have hereunto subscribed my name and affixed the seal of said court, at Trenton, in said District, this sixteenth day of June, nineteen hundred and eight.

H. D. OLIPHANT, *Clerk.*

93 And afterwards, to wit, on the third day of December, A. D. 1908, this case came on to be heard on the transcript of record from the Circuit Court of the United States for the District of New Jersey, before Hon. George M. Dallas and Hon. George Gray, Circuit Judges, and Hon. R. W. Archbald, District Judge, and was argued by Counsel, and the Court not being fully advised in the premises takes further time for consideration thereof.

And afterwards, to wit, on the 15th day of May, A. D. 1909, comes the parties aforesaid, and the Court now being fully advised in the premises renders the following majority opinion, Gray, Circuit Judge, dissenting:

In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1908.

No. 19.

CUBA RAILROAD COMPANY
v.
CROSBY.

On Error to the Circuit Court of the United States for the District of New Jersey.

For opinion below on rule for a new trial see 158 Fed., 144.
Howard Mansfield, for plaintiff in error.
Benjamin M. Weinberg, for defendant in error.
Before Dallas and Gray, Circuit Judges, and Archbald, District Judge.

ARCHBALD, *District Judge:*

The plaintiff is a citizen of Tennessee, and the defendant a corporation and citizen of New Jersey, in the Circuit Court of which this suit was brought. The action is for personal injuries received by the plaintiff while at work for the defendant in the capacity of stationary engineer in a planing mill, in the Island of Cuba. The negligence charged is the failure to provide reasonably safe machinery and appliances; and the defense set up, in addition to denying the charge so made, was that the negligence, if any, was that of a fellow servant, or, if there was a defect in the machinery, that it was obvious, and the plaintiff therefore assumed the risk. The parties went to trial on these familiar issues, and the jury gave a verdict for $6,000.00 on which judgment was duly entered,
94 a motion for a new trial being overruled. The complaint here is, that the court should have directed a verdict, the law of Cuba on the subject of negligence and the relative duties of master and servant not having been shown, the plaintiff as it is claimed, being called upon to allege and prove what that law was, in order to make out a case. To this we are unable to agree. The cause of

action is not one unknown to the common law, and so dependent upon statute, as in the case of negligence causing death. Neither is it, as in Slater v. Mexican Nat. R. R., 194 U. S., 120, expressly brought to enforce a liability of that character, arising abroad, the foreign statute—that of Mexico—being declared on and proved, and the damages by way of annuity or pension thereby given, being sued for and claimed. It may be conceded also, that, having arisen in a foreign state, it is to be decided according to the law which there prevails, once it has been proved. But the question here is whether, a case having been established in all respects consonant with our ideas of right and justice, by which the plaintiff is thereby entitled to recover, according to the law as we understand it, we must stay our hands until the foreign law is shown. The question is not one peculiar to the Federal Courts, nor to be disposed of by any special rule prevailing there. Neither is it confined to the subject of torts. It may arise as well in a suit with regard to a note or bond, a policy of insurance, an inheritance, or a deed; and in each must receive similar treatment. However perfect in any such instance therefore, the obligation may seem to be, no case is made out on which a verdict can stand, according to the doctrine which is contended for, unless at the same time the law of the foreign country where the obligation arose or the transaction took place, is first made to appear. It might be a great hardship, amounting to a denial of justice, to compel this in some instances that we can conceive of, as in case of Senegambia or Thibet. Nor can a distinction be made, that it shall apply to civilized countries that have a system of laws, while to countries that are uncivilized it shall not. The rule as advocated is, that no relief can be given and that no case in fact exists, as there possibly would be if judged by the law of the forum, but that everything must be referred to the law where the transaction took place; according to which, if it was an uncivilized country and had no laws, there would be no right nor any wrong to redress. This is not our understanding of the law. The correct rule, as to which all the authorities, as we read them agree, is, that, in the absence of proof of the foreign law, the court will apply the law as it conceives it to be, according to its idea of right and justice; or in other words according to the law of the forum. That is the case between the different states of the union, which in this respect are foreign to each other, where the presumption is freely if not universally indulged, that the law, except as it may be controlled by or
95 dependent upon statute, is the same. That also is the rule as to countries strictly foreign; nor is it confined to those where the common law prevails. It is only another way of stating, that, in the absence of proof, the law prima facie to be applied is the law of the place where the case comes up for trial. The authorities to this effect are so numerous as to be almost burdensome, but they are challenged by the argument, and it will not be out of the way, therefore, to go through them. It will simplify matters, however, and be more directly to the point to cite only those which cover the case where the country is strictly foreign.

The law is thus laid down in Jones on Evidence, 2nd Ed. Sect. 84; "Where the rights of litigants are to be determined in this

country, although those rights may be affected by proof of the law of a foreign country where the contract was made or the right acquired, in the absence of any such proof the law of the forum must furnish the rule of decision. Or as it was put in 2 Whart. Conflict Laws, Sect. 778, p. 1531; "Where there is no evidence as to the character of a foreign law, the courts will presume it to be the same as the domestic law; in other words, in lack of such evidence, the courts will presume the law governing the case before them to be the same as the lex fori." In 13 Am. & Eng. Encycl. Law, 2 Ed. p. 1060, 1061, after stating that it is a general rule throughout the United States that in the absence of proof as to the laws of a sister state, they will be presumed to be the same as the lex fori, and that this has been extended so as to apply to the laws of foreign countries, and also that while this is ordinarily limited to the common law and according to the weight of authority no presumption arises that other countries or states have adopted the statute law of the domestic forum, it is added that, "in the absence of proof of the foreign law, the court will of necessity proceed according to the law of the forum." And in 9 Encycl. Plead. & Prac. 543, it is said; "Where a foreign law is not properly pleaded and proved, the presumption is that it is the same as that of the state in which the action was brought." No where is the rule better or more clearly given than in Monroe v. Douglass, 5 N. Y., 447, where it is said by Foot, J.: "It is a well settled rule, founded on reason and authority, that the lex fori, or in other words, the laws of the country to whose courts a party appeals for redress, furnish in all cases prima facie, the rule of decision; and if either party wishes the benefit of a different rule or law, as for instance, the lex domicilii, lex loci contractus; or lex reisitæ, he must aver and prove it." Or as it is succinctly put in Linton v. Moorehead, 209 Pa., 646; "The law of * * * any * * * foreign state, if material, is a fact to be proved, and in the absence of such proof, it is presumed to be the same as the law of this state." This rule will be found to be abundantly sustained by an analysis of the cases.

96 Thus in Brown v. Gracey, Dow. & Ry., N. P. 41, 16 Eng. Com. Law, 426 n., action was brought on a promissory note and there was a verdict for the plaintiff. Defendant moved for a new trial on the ground that the contract was made in Scotland, and that the plaintiff should have proved what the Scotch law was, and that the defendant was made liable thereby. But Abbott, C. J., said that if the law of Scotland differed from the law of England as to liability, it lay on the defendant and not the plaintiff to prove it, and a rule was therefore refused. This case is cited with approval by Willes, J., speaking for the Exchequer Chamber in Lloyd v. Guibert, L. R., 1 Q. B., 113, 129, where it is said; "A party who relies upon a right or an exemption by foreign law, is bound to bring such law properly before the court, and to establish it by proof. Otherwise, the court, not being entitled to notice such law without judicial proof, must proceed according to the law of England."

In Scott v. Lord Seymour, 1 Hurls. & Colt., 219, action was brought by one British subject against another for an assault and

battery committed in Italy, and it was held by the Court of Exchequer, as well as the Exchequer Chamber, that objection, that by the law of Italy damages could not be recovered until certain penal proceedings which had been there commenced were determined, was a matter of procedure only and no bar to an action in England. And Wightman, J., was of opinion, that, if an action would lie by the English law for a particular wrong the English courts would give redress, although it was committed in a country, by the laws of which no redress was granted, if the parties were both British subjects.

In The Halley, L. R., 2 P. C., 193, it is said by Selwyn, Lord Justice; "It is true that in many cases the courts of England inquire into and act upon the law of foreign countries, as in the case of a contract entered into in a foreign country, where by express reference, or by necessary implication the foreign law is incorporated with the contract, and proof and consideration of the foreign law therefore become necessary to the construction of the contract itself. And, as in the case of a collision on an ordinary road in a foreign country, where the rule of the road in force at the place of collision may be a necessary ingredient in the determination of the question by whose fault or negligence the alleged tort was committed. But in these and similar cases, the English Court admits the proof of the foreign law as part of the circumstances attending the execution of the contract, or as one of the facts upon which the existence of the tort, or the right to damages may depend, and it then applies and enforces its own law so far as it is applicable to the case thus established;" adding that in their Lordships' opinion it was alike contrary to principle and to authority, to hold that an English court would enforce a foreign municipal law, and give a remedy in the
97 shape of damages in respect of an act, which, according to its own principles imposed no liability on the parties from whom damages were claimed; thus showing how far, even when proved, the foreign law is limited.

The question seems to have arisen more oftener than anywhere in the New York Courts, where the rule is uniformly and consistently enforced. Thus in Monroe v. Douglass, 5 N. Y., 447, already referred to, the court was called upon to construe and carry out a testamentary settlement executed by Sir William Douglass, in Scotland, probated and disposing of estates there. There was no proof of what the law of Scotland was, but the court did not hesitate to entertain and dispose of the case on that account, which it proceeded to do, holding that in the absence of proof, it was to be determined according to the New York law.

In Whitford v. Panama R. R., 25 N. Y., 465, plaintiff brought suit as administrator for the death of the intestate, caused by the negligence of defendant company in the operation of its railroad on the Isthmus of Panama, in the then Republic of New Granada. It did not appear that a right of action was given in such cases by the laws of that country, and the action therefore failed, but in disposing of that question it is said that, while the courts do not in general take note of the laws of a foreign country except as they are

proved, in the absence of proof they indulged in certain presumptions, as, for instance, that a man is entitled to personal freedom and the absence of bodily restraint, as well as to be exempt from physical violence; for violation of which, committed abroad, if action be brought, the party need not, in the first instance, offer proof of their being unlawful in the place where they occurred, the courts not presuming the existence of a state of law, not consonant with reason and natural justice, in any country, whereby compensation is not given.

In Savage v. O'Neill, 44 N. Y., 298, trespass was brought for taking in execution, as the property of the husband, goods which were claimed by the wife. The wife testified that she loaned to her husband money which she got from her mother in Russia, for which her husband, by bill of sale, transferred to her the goods in question. The case turned on what her rights were to the money as against her husband under the Russian law. There was no proof of that law, but in the absence of it, it was held that the law of New York furnished the rule.

In Hynes v. McDermott, 82 N. Y., 41, which was an ejectment, the right of the plaintiffs to recover depended on their establishing relationship to one Hynes, which in turn depended on whether he had contracted a valid marriage. The evidence as to this was such
that it would warrant an inference of marriage by the laws
98 of New York, where suit was brought. But the acts and
circumstances on which this was predicated took place, a part on English soil, a part on a vessel crossing the channel to France, and a part in France, where the parties subsequently lived. It was conceded that the acts in England did not make out a valid marriage according to the English law, and the French law was not proved. But it was held that enough was shown as to what occurred in crossing the channel and in France, to establish a marriage according to the New York law, and that a verdict for the plaintiffs was therefore properly entered.

In Mackey v. Mexican Central R. R., 78 N. Y., Supp., 966, which cannot be distinguished in principle from the present case, it was declared that where suit is brought by the resident of the state against a foreign corporation to recover damages for personal injuries sustained through the negligence of the defendant, as a common carrier, in Mexico, it is not necessary to state the Mexican law in the complaint. If the law of Mexico denies the plaintiff's right to compensation, this is a matter of defence; for the court will not presume the existence of a state of law in any country by which compensation for such injuries is not provided.

In Pratt v. Roman Catholic Orphanage Asylum, 20 N. Y., App. Div. 352, affirmed 166 N. Y., 593, a bequest to St. Patrick's Church, Soho, England, was objected to on the ground that it did not appear that the legatee was an incorporated association competent to take. There was an effort made to prove that by the laws of England, such an unincorporated association may take for charitable purposes, but it failed. And it was held that a bequest to such an association being void by the laws of New York, it must, in the ab-

sence of proof, be held void in England too. "Whenever the question is presented," says Rumsey, J., "as to what the law of a foreign country in any given case, it must be established as a fact; and if there is no evidence given upon the question, the court will either make no presumption at all or will presume that the foreign law is the same as the law of this state."

Nor is there anything at variance with this in Crashley v. Press Publishing Company, 179 N. Y., 127, relied on by defendant's counsel. If it stood for what it is so cited, it would run counter to the current of the cases in that state, which have been referred to. But the fact is it does not. The action there was libel, for the publication in the New York World of an article reflecting on the conduct of the plaintiff with regard to certain happenings while he was a resident of Rio Janeiro, Brazil, the libellous charge in substance being that the plaintiff was engaged in a conspiracy to bring about a revolution in that country; the publication of the article having caused his arrest by the police of Rio Janeiro, and
99 his being put in jail there for several days. The complaint was dismissed at the trial and this was affirmed on appeal, it being held that no libel was shown, the article not being libellous per se, and there being nothing to show that by the law of Brazil the plaintiff was charged with crime. The ground of this decision, if carefully observed, will remove all question as to its purport. The article not otherwise reflecting on the plaintiff, it had somehow to appear that by the laws of the land where the occurrence with which he was said to have been connected took place, an offense was committed which made him amenable therein, which could only be shown by proof of what those laws were, as to which no presumption could be indulged; the frequent revolutions in South American countries, as it is somewhat gratuitously suggested, not warranting the in*ter*ference that the fermenting of them was derogatory to him. This goes a good ways. But however that may be, the mistake made is in identifying this in principle with a case where, independent of local law, and however it may be qualified thereby when it is shown, the plaintiff has a good case on its face and does not have to invoke the local law to make it out.

In Sokel v. People, 212 Ill., 238, the defendant was indicted for bigamy, it being charged that he had been married before at Safed, Palestine, Turkey, to prove which it was shown that a marriage ceremony had been performed there by a Rabbi, the defendant being of the Jewish faith, and celebrated by the defendant's family and friends. He was at that time but fourteen years old, and coming to this country he later married another woman in New York with whom he was living when indicted in Illinois. It was essential, of course, to a conviction, to establish that the first marriage was valid, and it was contended by the defendant that it was necessary, in order to do so, to prove that he was authorized by the laws of Turkey to contract a marriage in his then early age, and that what took place in fact constituted a marriage. But it was held that a public ceremony conducted by one in Holy Orders, purporting to marry the

parties, followed by cohabitation, having been shown, the presumption was that the marriage so apparently contracted, was valid by the Turkish laws, and that if it was not, the laws of Turkey relied on to show the contrary should have been proved by him. This case is a most significant one, because, in a criminal prosecution, while the rules of evidence, if anywhere, are strictly held, the presumption was indulged that in the absence of proof to the contrary, that which constituted a valid marriage in Illinois made out a valid marriage in Turkey, unless the opposite was shown.

In Carpenter v. Grand Trunk R. R., 72 Maine 388, plaintiff bought a ticket at Portland, Maine, for a through trip to Montreal. By its terms, it was only good for a continuous passage, entered upon within two days from its date. Plaintiff started on his journey, but stopped off at several places on the way within the state, relying on a Maine statute which gives the holder of such a ticket the right to stop off as he chooses, and makes it good for six years. He finally boarded a train in Canada for Montreal, but was ejected by the conductor because his ticket by its terms was not good, and thereupon he brought suit against the railroad in Maine. But it was held that the action could not be maintained, the act relied on having no extra territorial force, and the statute law of Canada not being presumed to be the same. The significance of this decision here is the recognition that in the absence of proof the case was to be decided according to the local law, the common law, however, and not the statute law of the state being applied, by the former of which the plaintiff had no case; and it is of peculiar interest and importance because of the distinction so drawn, which all the more confirms the rule.

In Woodrow v. O'Connor, 28 Vt. 776, the parties, who were then residents of Canada, submitted their differences to arbitrators, each executing a note to the other and depositing it with the arbitrators, to be delivered to the one in whose favor the award should be made. The plaintiff having got the award, brought suit in Vermont on the defendant's note; and it was held, that while the transaction was governed by the Canadian law, where the occurrence took place, there being no evidence as to what the law was, it would be assumed to be the same as that of Vermont, by which the plaintiff was entitled to recover.

In McLeod v. Conn. R. R. 58 Vt. 727, 6 Atl. 648, the plaintiff sued for personal injuries sustained in the Province of Quebec, through the defendant's neglect to construct and maintain its railway at a point where it crossed a public highway there, as it should, according to the requirements of the statute law of the Province. This statute was not set out in the declaration, which was demurred to on the ground, that the action so shown was local and not transitory, and was not able to be brought in Vermont. But this view was not sustained. The right of action there, it is to be noted, depended on the Canadian statute, the same as where suit is brought on a foreign statute giving an action for death, as to which no presumption can be indulged; and this is to be taken in mind in order not to mis-

construe what is said. That there was no intention to lay down anything other or different than the prevailing rule, is shown by the decision last cited from the same state, as well as by the later one immediately following.

In State v. Merrill, 68 Vt. 60, the defendant was indicted for larceny. The proof was, that he stole a team in Canada and brought it into Vermont, the law of that state being that one who steals property in another jurisdiction and brings it into Vermont may be held there for larceny. The law of Canada showing that the act of
101 the defendant in taking the team amounted to larceny in that Dominion was not proved, in view of which, it was contended that no conviction could be had. But the court applied the presumption, that the law of Canada in the premises was the same as that of Vermont, and as the taking of the team under the circumstances shown amounted to larceny by the Vermont law, the conviction was sustained. Here again, the same as in Sokel v. People, 212 Ill. 238, above, we have the presumption applied in a criminal case. The observations of Rowell, J., in this case, on the general subject under discussion, are too long to quote, but may be consulted with good effect in this connection.

In Loaziza v. Superior Court, 85 Cal., 11, it was sought to enjoin proceedings which had been instituted to set aside a sale of mining property in Mexico, on the ground of fraud; and it was among other things objected that the law of Mexico upon the subject had not been shown. But it was held, that until the contrary appeared, it would be presumed, that the law of Mexico, on which the validity of the contract depended, was the same as that of California. And this decision was reiterated in Wickersham v. Johnston, 104 Cal. 407, where, according to the first head note, it is declared that: where there is no evidence tending to show what is the law of a foreign country touching the question raised, it must be presumed that it is the same as the law of the state where suit is brought.

In Chase v. Alliance Insurance Company, 9 Allen, 311, suit was brought on a policy of marine insurance, and the case turned on the construction to be given to the charter party, which, having been executed in Scotland, was to be governed by the law there. There was no proof, however, of what the Scotch law was, and judgment was thereupon given to the plaintiff in accordance with the law of Massachusetts. "The law of Scotland upon a question of Commercial law," as it is put in the head note, "will be presumed to be the same as our law, in the absence of Scottish adjudications or evidence to the contrary." So in Aslamian v. Dostumian, 174 Mass., 328, where the plaintiff sued to recover the money represented by a draft, drawn in Massachusetts on a party in Harpoot, Turkey, it was held, that whether the law of negotiable paper was known in Turkey requiring the protection by protest of such an instrument, was to be proved by the party who wished to profit thereby. And in Kittenthal v. Mascagni, 183 Mass. 19, where the Court was called upon to interpret a contract made in Italy, which by special stipulation was to be con-

strued according to Italian law, it was decided that it would be assumed, that "the law of Italy is like our own."

These cases taken at random from the reports, and by no means exhausting the list, conclusively show the law as it is administered in the state and in the English courts. Nor in the Federal courts is a different rule in any respect applied.

102 Thus in Danaise v. Hale, 91 U. S. 13, suit was brought to recovered the value of certain personal property, which it was charged that the defendant when Consul General of the United States in Egypt, had unlawfully and maliciously attached. The defendant set up, that what he did he did in his official capacity, being invested with judicial functions over citizens of the United States residing in Egypt, as the plaintiff then was. His authority in the premises depended however on the powers given him by the Turkish law: and it was held that this he was bound to plead and prove. The significance of this case consists not only in what it decides but in what it assumes and recognizes. The alleged trespass occurred in Egypt, and it was thus of course controlled by the local law, once that was shown. No question was made however of the right of the plaintiff, having proved what amounted to a trespass as we apprehend it, in this country, to recover without showing what that law was; while the defendant, who sought to justify his acts under it, which were otherwise unauthorized, was required to prove that he was exempt from liability thereby. This was altogether unnecessary, however, it is to be observed, if the rule which is now contended for were to prevail, it being incumbent on the plaintiff, according to that as the first step in his case—the transaction having occurred in a foreign country—to show what the law of that land is and that he has a right to recover under it.

But the question is set at rest, as it seems to us, by what is said by Mr. Justice Bradley, speaking for the court in the Scotland — 105, U. S. 24. "In administering justice between parties," says that eminent judge, "it is essential to know by what law, or code, or system of laws, their mutual rights are to be determined. When they arise in a particular country or state, they are generally to be determined by the laws of that state. Those pervade all transactions which take place where they prevail and give them color and legal effect. Hence if a collision should occur in British waters, at least between British ships, and the injured party should seek relief in our courts, we would administer justice according to the British law, so far as the rights and liabilities of the parties were concerned, provided it were shown what that law was. If not shown, we would apply our own law to the case. In the French or Dutch tribunals they would do the same. But if a collision occurs on the high seas, where the law of no particular state has exclusive force, but all are equal, any forum, called upon to settle the rights of the parties, would prima facie, determine them by its own law, as presumptively expressing the rules of justice; but if the contesting vessels belong to some foreign nationality, the court would assume that they were subject to the law of th-ir nation, carried under their common flag, and would determine the controversy accordingly. If they belonged to different national-

ities having different laws, since it would be unjust to apply the laws of either to the exclusion of the other, the law of the forum,
103 that is, the maritime law as received and practiced therein would properly furnish the law of decision. In all other cases, each nationality will administer justice according to its own laws."

In line with these views, in Davison v. Gibson, 56 Fed. 443, it was held by the Circuit Court of Appeals of the Eighth Circuit that where the right of the parties depended on the laws of the Creek nation, while the court would not take judicial notice of what those laws were, and neither would it presume that they were regulated by the common law, yet in the absence of proof as to what they actually were, the law to be applied was the law of the forum, and the court below was reversed for not doing so.

There is nothing counter to this doctrine in Slater v. Mexican National R. R. 194 U. S., 120, upon which much reliance is placed. The action there was to recover for the death of an employee, a switchman, who was killed in Mexico, by the negligence of the defendant company, operating there. The right to recover was based on the Mexican law, which was set out and proved, as it had to be, there being no right of action otherwise. The compensation provided by that law, where death has been wrongfully caused, looks to the support of the dependent family by periodical payments, enforced by a decree analogous, as it is said, to a decree for alimony, and subject to modification from time to time, as circumstances vary. This measures the liability and inheres in and gives character to the relief given by that law, and the courts of this country having no means for entering or enforcing a judgment of that kind, it was held that an action here could not be sustained. That is the whole of the decision, and if it is kept in mind, no confusion can arise over what is said or what it stands for. In no respect was the question involved, which is here mooted, whether on proof of a case otherwise good by the law as it is apprehended in this country, the plaintiff is entitled to recover, or is to be nonsuited, on its being shown that it arose abroad, if the foreign law is not proved in the same connection. What is said in the case is to be construed in the light of what was decided; not what was decided by what was said.

Neither is there anything which touches the question, in Mexican Central R. R. v. Eckman, 205 U. S., 536, which was ruled on the strength of the Slater case; the question there certified and passed upon being simply whether the plaintiff, who had been injured while in defendant's service in Mexico, could recover without regard to the laws of that country, those laws having been put in evidence and proved, and showing the same character of liability discussed in the Slater case. Nor is the Court of Appeals of the Fifth Circuit to be regarded as having laid down any different rule. In Mexican Central R. R. v. Marshal, 91 Fed. 933, in that court, the plaintiff brought suit for injuries received while in the defendant's employ as a
104 freight conductor in Mexico. He did not prove the laws of that country, and the defendant, while supplying them in part, stopped short of proving all of them, the article regulating the

operation of railroads being omitted. But it was held, that the failure to prove this article was not fatal. "Because," as it is said, "in the absence of proof, it is to be presumed, that, in the matter of liability of an employer for his negligence, resulting in injuries to an employee, the law of Mexico is the same as the law of Texas, in both of which the civil law originally prevailed." And this declaration was repeated in Mexican Central Railroad v. Glover, 107 Fed. 356, where the facts were substantially the same, except that there was no proof whatever of the Mexican laws, and the defendant on the strength of this, moved that a verdict be directed, which was refused. It is true, that the presumption as to the laws of Mexico were indulged, because of the common origin with those of Texas. But the contention here is, that there can be no presumption whatever, in any such case, the foreign law having to be alleged and proved, which these two decisions effectively refute.

Nor is the case of Mexican Central Railroad v. Chantry, 136 Fed. 316, in the same court, at variance with this. There, as in the others, the action was for personal injuries suffered by the plaintiff while employed by the defendant company as a railroad conductor in Mexico. But, differing from the others, the laws of that country were pleaded and proved, both these which gave the plaintiff a right of action, and those set up by the defendant, by which it was sought to be established in bar, that, by legal proceedings had in Mexico, it had been decided that there was no liability by reason of the accident, and that the plaintiff had thus no cause of action. It was with a case of that character that the court had to deal, and to it whatever was said was necessarily addressed. There is nothing as we view it which bears, one way or the other, on that which is involved here. But if there is, it is to be taken with the facts of the case in mind. It cannot be assumed, that there was any intention of qualifying the law, as it had been laid down by the same court in the cases which had gone before, where the question here in issue came squarely up and was decided.

Having thus demonstrated, as we feel that we have from this review of the authorities, that, in the absence of proof, as to what the foreign law is, a cause of action, good as to the law of the forum, unaffected by statute, is entitled to prevail, the judgment in the court below must stand. It is not as though there was a divergence of authorities, some holding one way and some another, as to which a difference of opinion might thus be indulged and whichever way they preponderated, the court would be entitled to choose those which suited it best. As we regard them, they are all one way, without a variant note, the contrary rule, which we are asked to lay down, whatever be said of its logic, having nothing by way of au-
105 thority on which to stand. The plaintiff, as already stated, made out a complete case under our law based on the established duty of the master to his servant, to exercise due care to supply him with reasonable safe machinery and appliances with which to work. This duty is not one imposed by statute, however it may be increasingly regulated or controlled thereby. It is one which has been evolved by the courts, out of the character of the relation as a

matter of right and justice, which may thus be well assumed to be the law of every civilized land, until something different is shown, particularly where, as here, the rights of citizens of the same nationality are involved. And on this theory the case was tried, the plaintiff proving that which would ordinarily be regarded as sufficient to make out a case of negligence by which the defendant would be liable, and the defendant denying and endeavoring to meet this by charging the accident to the negligence of a fellow workman, and setting up the plaintiff's knowledge of the defect and assumption of the risk. Both parties thus planted themselves squarely on their respective rights at common law, recognizing, if not conceding, that they were to be so determined. It is true, that, at the close of the plaintiff's case and again when the evidence on both sides was in, a motion was made to dismiss the case on the ground which is now urged. But that does not change the fact, that as it was actually tried, it was treated as depending on and governed by the law as ordinarily understood. Not only because of that but above all, because of the rule which uniformly prevails, that, in the absence of proof to the contrary and until the foreign law has been actually shown, the law of the land is to be applied, the case in our opinion was correctly ruled at the trial, and should now be affirmed.

Endorsed: No. /19. October Term 1909. United States Circuit Court of Appeals for the Third Circuit. Cuba Railroad Company, v. Crosby. Opinion. Filed May 15, 1909.

In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1908.

No. 19.

CUBA RAILROAD COMPANY a Corporation Organized under and by Virtue of the Laws of the State of New Jersey, Plaintiff in Error,

v.

WALTER E. CROSBY, a Citizen of the State of Tennessee, in the United States of America, Defendant in Error.

106 In Error to the Circuit Court of the United States for the District of New Jersey.

Before Dallas and Gray, Circuit Judges, and Archbald, District Judge.

GRAY, *Circuit Judge*, dissenting:

The writ of error in this case brings up for review a judgment rendered in the circuit court of the United States for the district of New Jersey. The action in which said judgment was rendered, was brought by the defendant in error (hereinafter called the plaintiff) against the plaintiff in error (hereinafter called the defendant), for personal injuries alleged to have been received while the plain-

tiff was an employé of the defendant, in a planing mill conducted by said defendant in the Republic of Cuba. These injuries were alleged by the plaintiff to have been the result of defendant's negligence in not maintaining a certain stationary engine, at which plaintiff was employed by defendant as an engineer, in a reasonably safe, stable, and proper condition, so as not to endanger the safety of those of its employés who were compelled to work near or about the same.

The defendant was a corporation of the state of New Jersey, and the plaintiff proved that he was a citizen of the state of Tennessee. The general jurisdiction of the circuit court, therefore, attached, by reason of the diversity of citizenship. Plaintiff's declaration stated the ordinary case of negligence of the employer, in not using due care under the circumstances to provide for its employés safe tools, machines, and appliances with which to work.

If the negligent acts, as charged in the declaration, had been committed in the state of New Jersey, it is not questioned that, by the laws of that state, the laws of the forum, a right of action would have accrued to the plaintiff. The declaration, however, charges that these negligent acts were committed at Camaguey, in the Republic of Cuba, and the case was therefore justiceable in the circuit court of the United States for the district of New Jersey, only in case the injury complained of constituted an actionable wrong under the laws of Cuba, and imposed upon the wrongdoer an obligation to make reparation. There is nothing, however, in the plaintiff's declaration to indicate what right of action accrued to him, or what obligation was imposed upon the defendant in the premises, by such laws. Those laws were in nowise referred to, and the case was presented to the court below on the theory that, the plaintiff's right to recover was established by the law of the forum, or else upon the theory that, the law of the place where the alleged wrong was committed was to be presumed to be the same as that of the law of the forum. The theory first mentioned is, of course, untenable, and we think the latter is equally so.

107 It is well settled that, though the act be wrongful by the foreign law, if it is not wrongful by the law of the forum, no action will lie, comity of the courts not extending, either in this country or in England, to the enforcement of liabilities not recognized by the law or policy of their own state or country. (Macdade v. Fontes, L. R. 2 Q. B., 231; Phillips v. Eyre, L. R., 6 Q., B., 1). The theory upon which such liabilities may be recognized and enforced, is clearly stated by the supreme court in the late case of Slater v. Mexican Natl. R. R. Co., 194 U. S., 120, 126. An action had been brought in the United States Circuit Court of Texas, by the widow and children of William H. Slater, against a Colorado corporation operating a railroad in the Republic of Mexico, to recover damages for the death of the said husband and father, who was employed by defendant company as a switchman on its road, and was killed, as alleged, through defendant's negligence, while coupling two freight cars in Mexico. The laws of Mexico, conferring a right of action, were set forth in plaintiff's petition. The defendant, by plea, set

forth additional sections of the Mexican statute, by reason of which, as it contended, the action given by the Mexican laws was not transitory. A demurrer to this plea was sustained by the court below. The case was then taken to the circuit court of appeals, where the judgment was reversed and the action ordered to be dismissed. This judgment of the court of appeals came before the supreme court, on certiorari. Mr. Justice Holmes, in delivering the opinion of the supreme court, said:

"We assume for the moment that it was sufficiently alleged and proved that the killing of Slater was a negligent crime within the definition of Article 11 of the Penal Code, and therefore, if the above section were the only law bearing on the matter, that they created a civil liability to make reparation to any one whose rights were infringed.

"As Texas has statutes which give an action for wrongfully causing of death, of course there is no general objection of policy to enforcing such a liability there, although it arose in another jurisdiction. Stewart v. Baltimore & Ohio R. R., 168 U. S., 445. But when such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in any degree is subject to the lex fori, with regard to either its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operative outside its own territory. The theory of the foreign suit *if* that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an obligatio, which, like other obligations, follows the person, and may be enforced wherever the person may be found. Stout v. Wood, Blatchf. (Ind.) 71; Dennick v. Railroad Co., 103 U. S., 11, 18. But as the only source of this
108 obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation, Smith v. Condry, 1 How., 28, but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose."

In Cooley on Torts (3rd Ed.) page 900, it is said: "But it is agreed that to support an action (for a foreign tort) the act must have been wrongful or punishable where it took place, and that whatever would be a good defense to the action if brought there, must be a good defense everywhere." See also Herrick v. Minn. & St. Louis Ry., 31 Minn., 11.

It is clear, therefore, that the existence of an obligation, and the right to its enforcement by the foreign law, is essential to a valid cause of action in the trial forum, and the general rule in this country and in England undoubtedly is the one which flows logically from the premises, viz.: that the existence of such obligation under the foreign law must be alleged and proved in the domestic forum; otherwise, no valid cause of action is made to appear to the court. In such cases, the foreign law must be proved as a fact; otherwise, the

plaintiff fails to make out his cause of action, which is the obligation imposed on the defendant by that law, and by that law alone.

It must be noted that, in Slater v. Mexican Natl. R. R. Co., the court, in the beginning of the statement which we have extracted from the opinion, say: "We assume for the moment that it was sufficiently alleged and proved that the killing of Slater was a negligent crime, within the definition of Article II of the Penal Code." So, also, in the case of Mexican Cent. Ry. Co. v. Chantry, 69 C. C. A., 454, which was not a case of death, but a suit brought in the circuit court of the United States, for injuries received by the plaintiff, in Mexico. The petition set forth the laws of Mexico, which created the obligation sued upon, and the circuit court of appeals for the fifth circuit, said:

"To recover in this transitory action for the alleged personal injuries, it must be shown that the laws of Mexico give a right of action. Foreign laws are matters of facts, and, like other facts, must be pleaded and proved. Liverpool & G. W. S. Co. v. Phœnix Ins. Co. 129 U. S., 397. Assuming that in this case it has been sufficiently pleaded and proved that under the laws of Mexico the plaintiff is given a civil right of action to recover from the defendant company for the injuries in question, we still meet the proposition that," the right of action was extinguished under the same laws.

The court then say:

"After much consideration, we conclude, on principle and
109 authority, that the rule declared in McLeod v. Connecticut & P. R. Co. (Vt.) 6 Atl., 648, as follows: 'Although a civil right of action acquired or a liability incurred in one state or country for a personal injury may be enforced in another to which the party in fault may have removed or where he may be found, yet the right of action must exist under the laws of the place where the act was done or neglect accrued. If no cause of right of action for which redress may be had exists in the country where the personal injury was received, then there is no cause of action to travel with the person claimed to be in fault, which may be enforced in the state where he may be found'—is a correct statement of the law of the case."

However, it may be in cases where the alleged injury was committed in one of the other states of the Union, or in other places where the English Common Law prevails, there is clearly no presumption in the plaintiff's favor in the case under consideration. The court will take judicial notice of the fact, that Cuba is one of the Latin Countries where the common law, as we understand it, is not in force. As we have said, there is here no allegation of a cause of action under the laws of Cuba, or any reference to such laws. The plaintiff testified as to the facts as they occurred in that Republic, and as he has not alleged, neither did he prove, that under the laws of Cuba any obligation was imposed by reason of said laws on the defendant. At the conclusion of plaintiff's testimony, defendant's counsel moved that the case be dismissed, on the ground that it clearly appeared that plaintiff had made out no cause of action justiceable in the forum in which his suit was being tried. The court overruled the motion as one for a non-suit, saying that it would enter-

tain a motion later. When the case closed, defendant's counsel move' to instruct the jury in favor of defendant, on the ground that the court had no jurisdiction, because it had not been proved that the law of Cuba gave any right of action on the facts in evidence. This motion was denied and exception was duly taken and allowed. After verdict in favor of the plaintiff, defendant's counsel, on the same ground, moved to set aside the same and enter judgment for defendant, notwithstanding the verdict. In denying this last motion, the learned judge of the court below delivered an interesting opinion. The part pertinent to our present purpose, we quote, as follows:

"An action brought in one of our states for damages resulting from a common law tort committed in another of our states may doubtless be maintained without proof of the lex loci. But when an action to recover damages for a wrongful act committed in another state is maintainable solely under some statutory authority of that state, and not under the common law, there the statute of the state conferring the right of action must be both pleaded and proven by him who asserts the right. See Wooden v. N. Y. & P. R. R. Co., 126 N. Y., 10, and Keep v. Natl. Tube Co., 154 Fed., 121. In the present case the right of action is not based on any statute of Cuba, and the defendant insists that the common law cannot be presumed to exist in Cuba, inasmuch as that country was formerly a Spanish colony.

110

But, as above stated, the defendant has filed the plea of the general issue only. The declaration alleges what, according to the lex fori, is actionable negligence on the part of the defendant. The defendant by pleading the general issue has not denied the legal sufficiency of the allegations of the declaration. If the lex loci delicti does not give to the plaintiff a right of action, that defense should have been presented by a special plea and supported by proofs offered by the defendant. I do not think it was obligatory on the part of the plaintiff to set forth in his declaration in express terms what the special law of the Republic of Cuba on the subject of actionable negligence may be. He had the right to set forth a cause of action which, according to the law of the forum, would be complete, and in the event of a conflict between the lex loci and the lex fori, the defendant ought to have shown by a proper plea that under the lex loci the plaintiff acquired no right of action."

I cannot take this view of the rights of the defendant in this case. In the first place, there is nothing in either pleadings or proofs to show that the plaintiff was clothed with a right of action under any law of the Republic of Cuba. In the next place, how are we to know, if there is any right of action at all, that it is not conferred by a statute whose limitations may be such as to render it not transitory, as was the case in Slater vs. Mexican Natl. Railroad Co. (supra)? There is nothing upon which to found the statement of the learned judge of the court below, that "in the present case, the right of action is not based on any statute of Cuba." If presumption were allowable as to this, the only reasonable one would be, that whatever right of action the plaintiff was clothed with, would be, as in Mexico and other Latin Countries, derived from the written

law of a civil code. As we have already said, there could be no presumption that the common law, as enforced in the federal court for the district of New Jersey, was in force in Cuba, where the accident happened, and we cannot see how the plea of the general issue could relieve plaintiff from fully establishing the cause of action upon which he has brought suit. It would, indeed, be a hard rule that would compel the defendant, by affirmative plea and testimony, to assume the burden of proving a negative, by showing that there was no law justifying the action in Cuba. If it is to be considered a question of jurisdiction, that question can always be raised in any form and at any stage of the trial. But the term jurisdiction is somewhat vague and elusive. Courts may have general jurisdiction of the parties and subject matter of a suit, and yet will not further entertain it when no cause of action is shown, and the word "jurisdiction" is sometimes loosely applied in that sense.

111 It is not necessary, therefore, to deal with this case as one technically of jurisdiction, or to consider how it should be questioned, whether by demurrer or plea. The plaintiff comes into the court below, in New Jersey, declaring that he has suffered damage by reason of certain alleged negligent acts committed by the defendant in Cuba. Under a plea of the general issue, he produces testimony tending to prove the acts alleged, but offers no proof that said alleged negligent acts constituted a cause of action in Cuba. Why should not the defendant have the right to require that he should complete his proof, by fully establishing his cause of action, and where he has failed to do so, to demand either that the case be dismissed, as in an ordinary case of failure of proof, or, that peremptory instructions upon all the evidence be given to the jury? The lex fori cannot help the plaintiff, as the right of the plaintiff and the obligation of the defendant must exist under the lex loci or not at all.

As the federal courts will take judicial notice of the laws of the several states composing the Union, it would not be necessary, in a case like the present to allege or prove the law of a state different from that of the forum, and it will be presumed, in absence of proof to the contrary, that in countries where the common law of England prevails, the lex loci is the same as the lex fori. Such a presumption, however, takes the place of proof, is a kind of proof, and is founded upon known probabilities, and is very unlike a legal fiction which exists independently of all probability and even of known facts. Here, outside the region of recognized probability upon which to found a presumption, the proposal is to presume the plaintiff's whole case—its entire foundation—as if, in an action upon an express contract—the existence of the contract itself were asked to be presumed—something quite different from indulging a presumption merely for an incidental purpose in the course of, and for the advancement of, a trial. It is true that we may presume that in all civilized countries, negligence is unlawful, but it is another and quite different thing to presume that the "law of negligence" is in all respects identical in all of them. No other subject is so fruitful of litigation or more prolific of nice distinctions. While it is very

likely that harmful negligence is held to be culpable wherever legal wrongs are redressed, it is very unlikely that the law — respect to torts, in states governed by the civil code, coincides with, and is without variance from, that where the common law prevails. Presumptions are resorted to for convenience in the administration of law, and in any case and for any purpose it is only probable, and never the improbable, which the law ventures to assume. I know of no authority questioning these propositions and of no decision binding upon this court that controverts the logical conclusion therefrom.

There is no reason of public policy of comity which requires the courts of this country to relax their rules of procedure, so as
112 to encourage or invite those who suppose themselves clothed with rights of action under foreign laws to litigate them in our courts. Nor is there any hardship, in a case like the present, where the plaintiff omits or declines to fully allege or prove his cause of action, in remitting him to the country by whose laws, and by whose laws alone, his right of action exists. Nor can the plaintiff complain, who seeks to enforce in the courts of this country, in an action of tort, an obligation which, if it exists at all, depends absolutely for its existence upon a foreign law, that he should be required to so equip himself as to be able to allege and prove what that foreign law may be.

I think that, in the rulings of the court below upon these questions, there was error, and that the judgment below should be reversed.

In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1908.

No. 19.

CUBA RAILROAD COMPANY, Plaintiff in Error,
vs.
WALTER E. CROSBY, Defendant in Error.

In Error to the Circuit Court of the United States for the District of New Jersey.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States, for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed with costs.

Philadelphia, May 20, 1909.

GEO. GRAY,
Circuit Judge.

113 In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1908.

No. 19.

CUBA RAILROAD COMPANY, a Corporation Organized under and by Virtue of the Laws of the State of New Jersey, Plaintiff in Error,

v.

WALTER CROSBY, a Citizen of the State of Tennessee, in the United States of America, Defendant in Error.

The petition of The Cuba Railroad Company, Plaintiff in Error, respectfully shows to the Court:

First. Your petitioner was sued in the United States District Court for the District of New Jersey for damages for injuries alleged to have been caused by the negligence of your petitioner. The plaintiff recovered judgment in the sum of $6,000. against your petitioner.

Second. Your petitioner duly reviewed said judgment by a writ of error to the United States Circuit Court of Appeals for the Third Circuit and duly filed a bond in the sum of $12,000, staying the execution on said judgment.

Third. Said writ of error was duly argued before the United States Circuit Court of Appeals, Third Circuit, and a majority and dissenting opinion were filed herein in the office of the Clerk of the United States Circuit Court of Appeals, Third Circuit, on or about the 17th day of May, 1909. The majority opinion by Hon. R. W. Archbald, District Judge, affirmed the judgment.

Fourth. Your petitioner believes that the judgment herein, as affirmed by the Circuit Court of Appeals, is erroneous and contrary to the decisions of the Supreme Court of the United States, and intends, in good faith, to apply for a writ of certiorari to the United States Supreme Court to review said judgment and has already started drawing the petition for such a writ.

Fifth. The petition, however, cannot be passed upon by said United States Supreme Court until the term of said Court appointed to be held October, 1909.

Sixth. Your petitioner is informed and believes that said Walter Crosby is insolvent and would be wholly unable to repay the amount of the judgment should the petition be granted and the judgment reversed or the action dismissed.

Seventh. Your petitioner desires that the stay be continued under the present bond pending the hearing and determination of
114 said application to the United States Supreme Court and until the determination on the writ of certiorari should said writ be granted.

Eighth. Your petitioner is making this application in good faith and not for purposes of delay.

Wherefore your petitioner prays that the issue of the mandate herein be stayed until the hearing and determination of the applica-

tion for the writ of certiorari herein, and in case said writ should be granted until the final determination thereof by said Court.

And your petitioner will ever pray.

THE CUBA RAILROAD COMPANY,
By HERBERT C. LAKIN, *Secretary.*

HOWARD MANSFIELD,
Of Counsel.

STATE OF NEW YORK,
County of New York, Southern District of New York, ss:

Herbert C. Lakin, being duly sworn, deposes and says:

I am the Secretary of The Cuba Railroad Company, the petitioner above named. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

HERBERT C. LAKIN.

Sworn to before me this 7th day of June, 1909.

[SEAL.] CHARLES D. MILLER,
Notary Public, Suffolk Co.

Cert. Filed New York Co.

Endorsed: U. S. Circuit Court Appeals, Third Circuit. Cuba Railroad Company, a corporation, etc., Plaintiff in Error, against Walter Crosby, etc., Defendant in Error. No. 19, October Term, 1908. Petition. Lord, Day & Lord, Attorneys for Petitioner, 49 Wall Street, New York. Howard Mansfield, of Counsel. Filed June 8, 1909. Wm. H. Merrick, Clerk.

115 In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1908.

No. 19.

CUBA RAILROAD COMPANY, a Corporation Organized under and by Virtue of the Laws of the State of New Jersey, Plaintiff in Error,
v.
WALTER CROSBY, a Citizen of the State of Tennessee, in the United States of America, Defendant in Error.

The Cuba Railroad Company, plaintiff in error herein, having filed with the Clerk of this Court on June 7, 1909, its verified petition stating that it intends in good faith to apply for a writ of certiorari to the United States Supreme Court to review the judgment affirmed by decision of this Court on the 17th day of May, 1909, and that the application for such writ cannot be passed upon until the term of the Supreme Court appointed to be held in October, 1909, and stating that said petitioner desires that the issue of the

mandate on said decision be stayed until the hearing and determination of the application for a writ of certiorari herein, and, in case said writ should be granted, until final determination thereof; now, therefore, on motion of Howard Mansfield, of counsel for the plaintiff in error, it is

Ordered that the issue of the mandate on the decision herein of the 17th day of May, 1909, be and hereby is stayed until the hearing and determination of the application by the plaintiff in error herein to the Supreme Court of the United States for a writ of certiorari to review said decision and the judgment affirmed thereby, and, in case said writ shall be granted, until the final determination thereof by said Court; the stay to be continued under the present bond given by said plaintiff in error.

Dated, June 14, 1909.

Per Curiam.

GEO. GRAY, *C. J.*
R. W. ARCHBALD, *D. J.*

Endorsed: U. S. Circuit Court of Appeals, Third Circuit. Cuba R. R. Co., a corporation, etc., Plaintiff in Error, v. Walter Crosby, etc., Defendant in Error. No. 19, October Term, 1908. Order Staying Mandate. Lord, Day & Lord, Attorneys for Plaintiff in Error, 49 Wall Street, New York. Howard Mansfield, of Counsel. Filed June 14, 1909. Wm. H. Merrick, Clerk.

116 UNITED STATES OF AMERICA, ss:

I, William H. Merrick, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify that the foregoing pages from 1 to 115 inclusive, to contain a full, complete and faithful copy of the original transcript of record and proceedings in the case of Cuba Railroad Company, Plaintiff in Error, vs. Walter E. Crosby, Defendant in Error, No. 19, October Term, 1908, on file and now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court at Philadelphia this eighth day of July, in the year of our Lord one thousand nine hundred and nine and of the Independence of the United States the one hundred and thirty-fourth.

[SEAL.]

WM. H. MERRICK,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

[Seal United States Circuit Court of Appeals, Third Circuit.]

117 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which The Cuba Railroad Company is plaintiff in error and Walter E. Crosby is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the Circuit Court of the United States for the District of New Jersey, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme
118 Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 19th day of October, in the year of our Lord one thousand nine hundred and nine.

JAMES M. McKENNEY,
Clerk of the Supreme Court of the United States.

119 [Endorsed:] File No. 21,811. Supreme Court of the United States. No. 585, October Term, 1909. The Cuba Railroad Co. vs. Walter E. Crosby. Writ of Certiorari.

120 United States Circuit Court of Appeals for the Third Circuit.

THE CUBA RAILROAD COMPANY, Petitioner,
vs.
WALTER E. CROSBY, Respondent.

Stipulation as to Record.

It is hereby stipulated and agreed by and between the parties to the above entitled proceeding in certiorari that the certified transcript of record now on file in the office of the Clerk of the United States Supreme Court, upon which a petition for a writ of certiorari, to be directed to the United States Circuit Court of Appeals for the Third Circuit, was granted by the United States Supreme Court at the October Term, 1909, shall be taken as a return to said writ.

Dated, October 22nd, 1909.

LORD, DAY & LORD,
Attorneys for Petitioner.
BENJAMIN M. WEINBERG,
Attorney for Respondent.

121 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, set:

I, William H. Merrick, Clerk of the United States Circuit Court of Appeals, for the Third Circuit, by virtue of the foregoing Writ of Certiorari and in obedience thereto do hereby certify to the Supreme Court of the United States the consent of the Counsel for the respective parties thereto annexed as my return to the said writ on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this first day of November in the year of our Lord one thousand nine hundred and nine and of the Independence of the United States the one hundred and thirty-fourth.

[Seal United States Circuit Court of Appeals, Third Circuit.]

WM. H. MERRICK,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

122 [Endorsed:] No. 585. 21,811. — Term, 190–. United States Circuit Court of Appeals, Third Circuit. The Cuba Railroad Co. vs. Walter E. Crosby. Certified copy of stipulation of counsel as to return to Writ of Certiorari.

123 [Endorsed:] File No. 21,811. Supreme Court U. S., October Term, 1911. Term No. 124. The Cuba Railroad Co., Petitioner, vs. Walter E. Crosby. Writ of certiorari and return. Filed November 2, 1909.

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 134.

THE CUBA RAILROAD COMPANY,
Petitioner,

vs.

WALTER E. CROSBY,
Respondent.

Brief for Petitioner on Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

HOWARD MANSFIELD,
Of Counsel for Petitioner.

HOWARD MANSFIELD,
Attorney for Petitioner.

CHAS. P. YOUNG CO.,
LAW PRINTERS [illegible],
[illegible] ST., NEW YORK.

Supreme Court of the United States.

October Term, 1911.

THE CUBA RAILROAD COMPANY, *Petitioner,* *against* WALTER E. CROSBY, *Respondent.*	No. 124.

BRIEF FOR PETITIONER.

Statement.

This case comes before this Court by writ of *certiorari* to the Circuit Court of Appeals for the Third Circuit, dated October 19, 1909, on the petition of The Cuba Railroad Company for the review of the decision of that court filed May 15, 1909, affirming a judgment of the Circuit Court of the United States for the District of New Jersey, entered on the 18th day of April, 1908, wherein it was adjudged that the plaintiff, Walter E. Crosby, an employee of The Cuba Railroad Company, have judgment for $6,043.30 in an action at law against the Company to recover damages for personal injuries caused by the alleged negligence of the Company in the Island of Cuba (Record, pp. 2, 77-94).

By the decision of the Circuit Court of Appeals, it was held that the plaintiff was not called upon to allege and prove what was the law of Cuba on the subject of negligence, and on the relative du-

ties of master and servant, but that, although such Cuban law was not set forth in the declaration, the plaintiff was entitled to recover on establishing a case consonant with the principles of the common law. The Circuit Court of Appeals further held that in the absence of proof as to what the Cuban law was, a cause of action good according to the law of the forum was entitled to prevail, and that the judgment in the Circuit Court must, therefore, stand. The Circuit Court of Appeals consequently adjudged that the judgment of the Circuit Court should be affirmed with costs; but on the petition of The Cuba Railroad Company, the issue of the mandate of the Appellate Court was stayed by an order filed June 14, 1909, until the final determination of the case by this Court on the present writ of *certiorari* (Record, pp. 94-97).

The decision of the Circuit Court of Appeals was not unanimous, Hon. Robert W. Archbald writing the prevailing opinion, in which Hon. George M. Dallas concurred, and Hon. George Gray writing a dissenting opinion. The case is reported in 170 Fed., 369. The prevailing opinion appears in the record at page 77, and the dissenting opinion at page 88.

The specific assignments of error stated in the Petition for Writ of *Certiorari* are as follows:

> "I. The Court erred in failing to reverse the refusal of the Trial Court to direct a verdict for the defendant, your petitioner, on the following grounds:
>
> 'That the Court has not jurisdiction of the alleged cause of action, because the alleged tort upon which this action was brought took place in Cuba, as appears by the declaration, and the plaintiff is not a resident of New Jersey, but is a resident of Cuba, and the defendant, while a New Jer-

sey corporation, owns and operates a large plant in Cuba; that the Court should not take jurisdiction of this action, for it is brought on a cause of action alleged to have arisen in Cuba, and there has been no allegation or proof that under the *lex loci delicti* the acts alleged gave this plaintiff any right of action against the defendant, and the Court should not take jurisdiction on the assumption that the Common Law prevails in Cuba, for Cuba has not been settled by England or English Colonies, and there is no presumption that the Common Law prevails there.'

"II. The Court erred in failing to reverse the refusal of the Trial Court to dismiss the action after the verdict on the following grounds:

'1. That the Court has not jurisdiction of the alleged cause of action, because the alleged tort upon which this action is brought took place in Cuba, as appears by the declaration; and the plaintiff is not a resident of New Jersey, but is a resident of Cuba; and the defendant, while a New Jersey corporation, owns and operates a large plant in Cuba.

'2. The Court should not take jurisdiction of this action, for it is brought on a cause of action alleged to have arisen in Cuba, and there has been no allegation or proof that under the *lex loci delicti* the acts alleged gave this plaintiff any right of action against the defendant.

'3. The Court should not take jurisdiction on the assumption that the Common Law prevails in Cuba, for Cuba has not been settled by England or English colonies, and there is no presumption that the Common Law prevails there.'

"III. The Court erred in holding that the law of the forum will be applied to a cause of action arising in a civil law country, instead of holding that in a transitory action for personal injuries it must be shown that the laws of Cuba give a right of action, and that foreign laws are matters of fact which must be pleaded and proved."

Facts.

This is an action for personal injuries, brought by the plaintiff, the respondent herein, an employee, against the defendant, The Cuba Railroad Company, the petitioner, for damages caused by the alleged negligence of said defendant in Cuba.

The Cuba Railroad Company, while it is a corporation organized and existing under the laws of the State of New Jersey, confines its sphere of operation to the Island of Cuba, where it owns and operates a railroad and, in connection with its car shops and general shops, a planing-mill and mechanical department (Record, p. 7).

The plaintiff sets forth in his declaration a common law cause of action, alleging that defendant "was engaged in operating and conducting a planning-mill at Camaguey, in the Republic of Cuba" (Record, p. 3), and that said plaintiff was injured "at Camaguey, in the Republic of Cuba, to wit, at Trenton, in the District of New Jersey aforesaid" (Record, p. 4). The plaintiff did not plead nor prove any Statute of the Republic of Cuba giving him a right of action on the facts alleged in his declaration. The defendant entered the plea of the general issue. At the end of the plaintiff's case, the defendant, the petitioner, moved to dismiss the action on the ground, among other grounds, that there had been no allegation or

proof that under the *lex loci delicti* the acts alleged gave the plaintiff a right of action against the defendant. The Court overruled the motion for a non-suit, not being certain about the point raised on the law of Cuba, but being in doubt on that point, and stated that a similar motion might be entertained later (Record, p. 21).

When the case closed, the defendant moved to instruct the jury in favor of defendant, on the ground, among other grounds, that the Court had not jurisdiction, because it had not been proved that the law of Cuba gave a cause of action on the facts as shown by the evidence (Record, p. 46).

The motion was denied, and the case went to the jury. After verdict in favor of the plaintiff for six thousand dollars ($6,000), defendant obtained a rule, in consonance with the statement of the Trial Court that such a motion would be entertained, requiring the plaintiff to show cause why the verdict should not be set aside and the action dismissed or a new trial granted, on the following grounds, among others (Record, p. 69):

> "1. That the Court has not jurisdiction of the alleged cause of action, because the alleged tort upon which this action is brought took place in Cuba, as appears by the declaration; and the plaintiff is not a resident of New Jersey, but is a resident of Cuba; and the defendant, while a New Jersey corporation, owns and operates a large plant in Cuba.
>
> "2. The Court should not take jurisdiction of this action, for it is brought on a cause of action alleged to have arisen in Cuba, and there has been no allegation or proof that under the *lex loci delicti* the acts alleged give this plaintiff any right of action against the defendant.

"3. The Court should not take jurisdiction on the assumption that the common law prevails in Cuba, for Cuba has not been settled by England or English colonies, and there is no presumption that the common law prevails there."

This motion was also denied, and judgment for the plaintiff was entered on the verdict (Record, p. 65).

On writ of error the judgment of the District Court was reviewed by the United States Circuit Court of Appeals for the Third Circuit, Judge Archbald handing down an opinion in which Judge Dallas concurred, for the affirmance of the judgment below, and Judge Gray handing down a dissenting opinion for reversal.

The application of the defendant to this Court, filed September 7, 1909, for a writ of *certiorari* to the Circuit Court of Appeals for a review of its decision, was granted October 19, 1909 (Record, p. 98).

POINT I.

The courts of the United States should not take cognizance of an alleged cause of action for a foreign tort where the rights of the parties under the foreign law cannot be certainly and definitely ascertained, and where the foreign tribunal is equally available to both parties.

The plaintiff was in Cuba at the time the accident happened and he testified that he had been working there for some years before he went into

the employment of the defendant. He went there for his health in 1900, and still resides there (Record, pp. 7, 60-63). The defendant's operations are entirely confined to Cuba where it owns and operates a steam railroad as well as a saw mill, and all defendant's property is situated there.

It must be assumed that the system of law in Cuba is adequate for the protection of its residents, or at any rate that when a Federal Court is asked to take cognizance of such an action as this, that court should be satisfied that the state of facts alleged in the plaintiff's declaration, if proved, constituted a wrong by the *lex loci delicti* for which the plaintiff could bring an action. This plaintiff gives no reason for leaving the forum appropriate to both parties, and bringing suit in the courts of the United States; and it is submitted that the plaintiff should do one of two things: either bring suit in Cuba and pursue his remedy there or bring suit in the Federal Courts only upon alleging and proving that he had the same cause of action under the laws of Cuba. It is not for a United States Court to pass upon what ought to be the law in a foreign country, for a man who goes to a foreign country and resides there submits himself to the laws of that country and can have no greater rights than are given him by said laws.

It is well known that a great many corporations are organized in the various States of the United States for the purpose of doing business in Spanish America. As a rule, the entire plant of such corporations is in the country in which they operate, and all their property and employees are there. Whenever an accident occurs to an employee or a third person, the natural place in which to seek redress is the local tribunal. As

said by this court in *Slater* v. *Mexican National R. R. Co.*, 194 U. S., 120, 129, "The case is not one demanding extreme measures like those where a tort is committed in an uncivilized country," and in Cuba, as in Mexico, it is to be presumed that the courts are open to plaintiffs, if the statute confers a right upon them.

The Spanish American countries derive their law from the Roman law, and it is contained in Statutory Codes; consequently any such liability as that upon which this employee sues, which may arise from the defendant's acts must, if it arises at all, derive its force from some statute. If the person injured, who has voluntarily taken up his residence in the civil law country, desires to bring suit on such a transitory action, he can, if the decision here under review be allowed to stand, come to the United States and set forth a cause of action at common law without pleading or proving that he had *any right of action at all* by the law of the land where he had resided, or showing that it was the kind of right of action which would be enforcible in our courts.

Yet this Court has held, in *Slater* v. *Mexican National R. R. Co., supra,* that, as a prerequisite to the granting of any remedy for a right arising under the civil law, our courts must be satisfied that the right is similar to the right given by the laws of the State in which the action is brought. In order to open the courts of this country to *transitory* actions arising in a foreign country and under a foreign law, the plaintiff should be compelled to set forth facts sufficient to show that by the *lex loci deliciti* an *obligatio* arose which is similar to the *obligatio* recognized by our courts.

A practical objection to allowing actions of this kind to be brought by a plaintiff hundreds of miles from the scene of the accident is, as was a fact in the present case, that the plaintiff can come into court and testify before a jury, while the defendant must usually rely on depositions in order to present its defense. Should a defendant bring the necessary witnesses into this jurisdiction, it would, in many cases, cause a virtual suspension of its operations. The rule laid down by the Circuit Court of Appeals for the Third Circuit has never before been followed, and should this decision, here sought to be reversed, be allowed to stand, it will tend greatly to increase the burdens of corporations organized in the United States to do business in foreign countries.

An illustration of the disadvantage under which such corporations may be required to defend actions by employees for personal injuries arising in foreign countries may be found in the present case. The plaintiff in his declaration avers that he was injured in consequence of the "imperfect and defective condition" of a stationary engine which the defendant was operating at Camaguey, and of the overhead pulleys and shafting connected with the engine, "*of which condition the said plaintiff had no notice or knowledge*" (Record, p. 3). Also that the plaintiff was injured in consequence of the employment by the defendant of a man "*known to the said defendant to be incompetent, inexperienced and wholly incapable of caring for and attending to said engine, to take charge of said engine, and to run, look after and care for the same,*" who "*permitted the said engine to be and become unmanageable and to 'race' or 'run away,' thus causing a severe strain to be placed upon the said pulleys, which then and there broke, whereby one of the pieces or parts of said pulleys struck the*

said plaintiff in his hand'' and otherwise injured the plaintiff (Record, p. 5). The testimony taken for the defendant by commission was to the effect that the engine was a new one and in good condition (Record, pp. 26, 38), and was installed by the plaintiff himself (Record pp. 33,39) and that the man who was alleged in the declaration to be incapable, had been retained in his position with the approval and on the request of the plaintiff (Record, p. 30).

But when the plaintiff came to testify, on the trial, he said that *he had noticed* that *the governor of the engine ''failed to work properly sometimes,''* and that *he had noticed* that *''the same thing happened some three times before the accident''* and that *he had notified* the superintendent *''that the governor was not working properly,''* and that he *''was afraid it would cause trouble and an accident''* (Record, pp. 11, 12). The plaintiff gave no testimony and offered no evidence that the engineer complained of in the declaration was in any way unfit for his position or that the accident was in any degree due to his incompetency.

Of course, it was not within the power of the defendant on the trial to produce witnesses to meet the testimony given in support of the new theory of the plaintiff's case.

The Court should not take jurisdiction in this case for another reason—a judgment in this suit might not bar a suit in Cuba. Under the laws of the United States a judgment is final, and satisfaction will bar a second suit. There is nothing here to show that a judgment recovered in the United States Courts would bar any right of action which the plaintiff might have in Cuba. The result might be that the defendant would be compelled to pay damages twice for the same injury.

POINT II.

The rule is that the *lex loci delicti* determines whether or not there is a cause of action.

The common law rule which is in force both in England and the United States is that, in order to justify a court in taking jurisdiction and giving a remedy for an act committed without the territorial jurisdiction of the court, it must appear that the act complained of was wrongful under both the local law and the law of the forum. This rule is expressed in *Machado* v. *Fontes* (1897), L. R. 2 Q. B. 231, as follows:

> "An action will lie in this country in respect of an act committed outside the jurisdiction if the act is wrongful both in this country and in the country where it was committed."

In *Phillips* v. *Eyre* (1876), L. R. 6 Q. B. 1, the court had said:

> "As a general rule, in order to found a suit in England, for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. * * * Secondly, the act must not have been justifiable by the law of the place where it was done."

To the same effect are

Coyne v. *Southern Pac. Co.* (1907), 155 Fed., 683;
Minor's Conflict of Laws, Sec. 202;
Dicey on the Conflict of Laws; American Notes by J. B. Moore, pp. 659, 667.

In Cooley on Torts (3rd Ed.), p. 900, it is stated:

> "But it is agreed that to support an action (for a foreign tort) the act must have been wrongful or punishable where it took place, and that whatever would be a good defense to the action if brought there, must be a good defense everywhere."

In this case there is no allegation or proof that a master is liable under the Cuban law for the negligence complained of by this plaintiff, and even though the act alleged in this declaration should render the master liable, it does not appear that he would be liable to a civil rather than to a penal action, or that his action is not barred by a statute of limitations. Proof that plaintiff has a right of action under the Cuban law and that this right existed at the time of his bringing this action is indispensable to the maintenance of an action in a court of the United States.

In *Mexican Central Ry. Co.* v. *Chantry* (Circuit Court of Appeals, Fifth Circuit, 1905), 136 Fed., 316, the plaintiff brought suit to recover damages for personal injuries received in Mexico while in the employment of the defendant. The court laid down the following rule:

> "To recover in this transitory action for the alleged personal injuries, it must be shown that the laws of Mexico give a right of action. Foreign laws are matters of fact and like other facts must be pleaded and proved."

This Court has held in *Mexican Cent. Ry. Co.* v. *Eckman,* 205 U. S., 538, that even though a citizen of Texas was injured in Mexico while in the employment of the defendant railroad company

(a Massachusetts corporation operating its railroad in Texas and Mexico) through defective appliances furnished by said railroad company, the plaintiff could not recover unless he were given a right of action by the laws of Mexico. The decision of the court in that case seems controlling in the present case. The facts were similar—a common law tort in a foreign jurisdiction being relied upon as the basis for a suit in the Federal courts. But this Court laid down the rule that the Federal courts will not take cognizance of a common law tort which arose in a civil law jurisdiction, unless the acts complained of gave rise to an *obligatio* in the jurisdiction where the alleged cause of action arose.

The rule of law laid down in the two preceding cases is controlling, and disposes of the dictum from *Scott* v. *Lord Seymour*, 1 H. & C.. 219, relied on by the Circuit Court (Record, pp. 52, 53, 54), and by the majority of the Circuit Court of Appeals (Record, pp. 79, 80).

POINT III.

There can be no presumption that the common law extends to Cuba.

While it is admitted that if the act complained of had happened in England, or in one of the United States, the presumption, in the absence of proof to the contrary, would be that the common law as enforced in the Federal Court for the District of New Jersey was in force where the accident happened, yet there is no such presumption in the plaintiff's favor in the case under consideration. In the case of a country not settled by Eng-

land or English colonists there is no presumption that the common law prevails there or that rights given by the common law exist in such country; and our courts must take judicial notice that Cuba was not settled by England or her colonists, but that it formed part of the Spanish possessions, and that the Civil Law obtains there, and that that law is wholly statutory.

As the U. S. Circuit Court of Appeals said in *Davison* v. *Gibson*, 56 Fed., 443:

> "It is very well settled that it will not be presumed that the English common law is in force in any state not settled by English colonists."

See also

> *Savage* v. *O'Neil*, 44 N. Y., 298;
> *Aslanian* v. *Dostumian*, 174 Mass., 328.

To the same effect is a recent New York case, *Crashley* v. *Press Publishing Co.*(1904), 179 N. Y., 27. In this case, the plaintiff, a resident of Brazil, sued a New York newspaper for libel on the ground that an article published in said newspaper in New York City, charging the plaintiff with treason to the government of Brazil, was libellous *per se*. The Court of Appeals, affirming the judgment dismissing the complaint, said, at page 32:

> "The article was not libelous *per se*. To complain of an article as being libelous, because charging the complainant with taking part in a revolt, or rebellion, within the government of Brazil, is quite insufficient, in the absence of an allegation of the existence of some statute making such an act a treasonable offense and prescribing pains, or penal-

ties, for the commission of the crime. The court cannot assume that the laws of Brazil are similar to the common law upon the subject of treason to the State. That the plaintiff was an alien resident within the government of Brazil is not material, in considering his right of action; inasmuch as his alienage may not, probably would not, have been available as a defense. (See case of *McLean*, 26 How. State Trials, 747.) *The difficulty is that the complaint does not allege what was the law of Brazil, with respect to the commission of the acts charged in the article*, and the presumption that the common law is in force is only indulged in by our courts with reference to England and those states which have taken the common law from England. (*Savage* v. *O'Neill*, 44 N. Y., 298.) (Italics ours.)

See also

Mex. Cent. Ry. Co. Ltd. v. *Chantry*, 136 Fed., 316.

POINT IV.

There can be no presumption, nor any ruling in the absence of pleading or proof, that the act alleged gave rise to a cause of action.

As pointed out in the preceding point, there can be no presumption that the common law extends to Cuba, in the face of the obvious fact that Cuba was not settled by England or her colonists, but that it formed a part of the Spanish possessions and that the Civil Law obtains there. From this fact it also follows, just as inevitably, that there can be no presumption that the alleged act

of negligence gave rise to any cause of action in Cuba. The Court will not indulge in any surmises as to the provisions of the Civil Law. That law must be pleaded and proved just as any other fact must be (*Mexican Central Ry. Co.* v. *Chantry, supra*).

It is a matter of common knowledge that the Civil Law is a written law derived from the Roman law and embodied in codes which are adopted by statute, and consequently that all the rights and remedies that arise in a Civil Law country are based directly on statutory enactments.

> Chase's Blackstone (3rd ed.) pp. 46, 47; *Banco de Sonora* v. *Bankers Mut. Cas. Co.* (Iowa), 95 N. W., 232.

It is admitted that if the plaintiff had alleged and proved that he had a right of action under the Civil Law of Cuba, then the court could give him his remedy (*Evey* v. *Mexican Cen. R. R. Co.*, 81 Fed., 294), provided that neither the right of action nor the remedy was dissimilar from the right of action and remedy at common law.

In *Slater* v. *Mexican Natl. R. R. Co.*, 194 U. S., 120, this Court refused the enforcement of a Mexican statute, although the statute was fully set forth in plaintiff's petition. The ground of this refusal was that the Mexican statute was so dissimilar from that in force in Texas, the place where the suit was brought, as to be incapable of enforcement by the Federal courts in Texas.

Mr. Justice Holmes, writing the opinion of this Court, said:

> "As Texas has statutes which give an action for wrongfully causing death, of course

there is no general objection of policy to enforcing such a liability there, although it arose in another jurisdiction. *Stewart* v. *Baltimore & Ohio R. R.*, 168 U. S., 445. But when such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in any degree is subject to the *lex fori*, with regard to either its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operative outside its own territory. The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which, like other obligations, follows the person, and may be enforced wherever the person may be found. *Stout* v. *Wood*, 1 Blackf. (Ind.), 71; *Dennick* v. *Railroad Co.*, 103 U. S., 11, 18. But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation, *Smith* v. *Condry*, 1 How., 28, but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose."

In the present case, the plaintiff has proved that the act complained of took place in a civil law country, but he has failed to show that it gave rise to any "*obligatio*" whatever.

In *Atchison, Topeka and Santa Fe Railway Co.* v. *Sowers*, 213 U. S., 55, the views expressed by this Court in *Slater* v. *Mexican National R. R. Co.* (*supra*) are reiterated, and this Court adds:

> "It is then the settled law of this Court that in such statutory actions the law of the place is to govern in enforcing the right in another jurisdiction" (p. 67).

In the later case of the *American Banana Co.* v. *United Fruit Co.*, 213 U. S., 347, this Court again emphasized its decision in the Slater case.

In this case, where an action was brought to recover three-fold damages under the Sherman Act, the complaint alleged various proceedings on the part of the defendant to the damage of the plaintiff in Costa Rica, but there was no pleading or proof to the effect that these acts were by the law of the place torts at all, however contrary to the ethical and economic postulates of the Sherman Act.

In holding that no cause of action under this statute was alleged, this Court said:

> "It is obvious that, however stated, the plaintiff's case depends on several rather startling propositions. In the first place the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States and within that of other states.
>
> * * *
>
> "No doubt in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as adequate, such countries may treat some relations between their citizens as governed by their own law, and keep to some extent the old notion of personal sovereignty alive. * * * They go further, at times, and declare that they will punish any one, subject or not, who shall do certain things, if they can catch him, as in the case of pirates on the high seas. In cases immediately affecting national interests they may go further still and may make and, if

> they get the chance, execute similar threats as to acts done within another recognized jurisdiction. An illustration from our statutes is found with regard to criminal correspondence with foreign governments. (Rev. Stat., §5335.) * * * And the notion that English statutes bind British subjects everywhere has found expression in modern times and has had some startling applications. * * * But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. *Slater* v. *Mexican National R. R. Co.*, 194 U. S., 120, 126" (pp. 355, 356).

In *Goodyear Tire & Rubber Co.* v. *Rubber Tire Wheel Co.* (1908), 164 Fed., 869, the question considered was whether or not the complainants, who were protected in this country by a United States patent, were equally protected in Cuba, where the defendants claimed the right to the invention under a registration in accordance with the Laws of Cuba.

The Circuit Court held that, as the defendants had made out their right to proceed under the registered patent as an independent monopoly protected by the law of Cuba, the case of the complainant necessarily failed.

But holding that Cuba, during the period of its military government by the United States was no part of the United States, but a foreign country, the court expressly held that "for this reason this court cannot take cognizance of the law of Cuba without plea and proof" (p. 873).

In *Farrell* v. *Farrell* (1911), 142 App. Div., 605, the Appellate Division of the New York Supreme Court for the First Department considered a question of dower where there had been no attempt

made to prove the law of Spain upon the subject, the real estate in question being located in that country.

The court refused to establish any right of dower saying:

> "But there is in this case not even proof that dower exists in any form in Spain, and the court can indulge in no assumption or speculations as to what the extent or nature of that estate (if any) may be under the laws of a foreign country, where the common law of England has never been adopted" (p. 620).

In *McLeod* v. *Railroad Company* (1886), 58 Vt., 727, the plaintiff sued to recover for personal injuries alleged to have been sustained in the Province of Quebec. The basis of the plaintiff's claim was a Canadian statute which plaintiff did not plead in detail. On appeal, the court affirmed the judgment sustaining a demurrer and said:

> "Although a civil right of action acquired or liability incurred in one state or country for a personal injury may be enforced in another to which the party in fault may have removed, or where he may be found, yet the right of action *must exist under the laws of the place where the act was done or neglect accrued.* If no cause or right of action for which redress may be had exists in the country where the personal injury was received, then there is no cause of action to travel with the person claimed to be in fault which may be enforced in the State where he may be found" (p. 735).
>
> • • •
>
> "Courts do not take judicial notice of foreign laws or laws of other states; and when a foreign law is relied upon as establishing a

duty or right of action, *it must be set forth in the declaration and proved as a fact*" (p. 737).

* * *

"It is not enough to state what the pleader deems to be the conclusion of the law as to the duty of the defendant. *It is essential that the foreign law from which the alleged duty springs should be so fully set forth that the court may see that the duty is established*" (p. 739). (Italics ours.)

Such is the case here. The respondent seeks to enforce a liability which, if it arose at all, arose by virtue of some Cuban statute, which he has neither set forth in his declaration nor proved as a fact.

In deciding adversely the motion to set aside the verdict, the trial court seemed to recognize the rule that in an action to recover damages for a wrongful act committed in a jurisdiction governed by statutes, instead of the common law, the statutes conferring the right of action must be both pleaded and proved by him who asserts the right, but held that it was incumbent upon the defendant in the present case to show by plea that under the *lex loci* the plaintiff acquired no right of action, citing in support of this view the case of *Scott v. Lord Seymour* 1 H. & C., 213. *But in that case it did not appear from the declaration, as in the present case, that the tort took place in a civil law country.*

It should certainly seem that a defendant is not called upon to controvert any substantial matter which is not either alleged in the declaration or based upon necessary presumption. Here it was neither alleged that the plaintiff had a cause of action under the law of Cuba, nor could it be presumed that the statutes of Cuba, where the court

must take judicial notice that there is no common law, gave the plaintiff, under the facts alleged, either the same or substantially the same remedy as that which he was seeking in the Federal court for the District of New Jersey.

The plaintiff Crosby, having alleged a transitory action arising in a civil law country, but failing to plead or prove that the acts complained of gave rise to any *obligatio*, the judgments below were clearly erroneous.

> *Mexican Cen. R. R. Co. Ltd.* v. *Eckman* (1906), 205 U. S., 538;
> *Chouquette* v. *Mexican Cen. R. R. Co. Ltd.* (Circuit Court of Appeals, 5th Circuit, 1907), 156 Fed., 1022;
> *Mexican Cen. Ry. Co. Ltd.* v. *Eckman* (Circuit Court of Appeals, 5th Circuit, 1909), 156 Fed., 1023;
> *Slater* v. *Mex. Natl. R. R.*, 194 U. S., 120.

The general rule is well settled that where the act complained of happened in a foreign jurisdiction and a right of action is alleged to have arisen therefrom, the law of the forum and the remedy of the forum must in some degree resemble the law of the wrong and its remedy. The Supreme Court of the United States has distinctly adopted this rule in *Northern Pacific R. R.* v. *Babcock*, 154 U. S., 190. The opinion of the Court cited with approval the opinion of the Court in *Herrick* v. *Minn. & St. L. Ry. Co.*, 31 Minn., 11, as follows:

> "The statute of another state has of course no extra-territorial force, but rights acquired under it will always in comity be enforced if not against the public policy of the laws of the former. In such cases the law of the place

where the right was acquired, or the liability was incurred, will govern as to the *right of action.*''

In *Parrot* v. *Mexican Central Ry.* (1911), 207 Mass., 184, the question of presumptions and burden of proof with respect to foreign law is extensively discussed in application to an action in a Massachusetts court on an oral agreement for the payment of money made in the City of Mexico.

Stating that ''in the application of the law there has been a great diversity in the decisions,'' the opinion in this case goes no further than to hold that there ought to be a presumption from common knowledge that a liability exists everywhere in certain cases, such as an action on a contract for goods sold and delivered in a foreign country upon a promise to pay a specific price, and an action for damages from an assault and battery, or from a larceny, committed in such foreign country.

But it is equally held that countries that live under a different system from that of the common law, are not presumed to be governed by provisions that exist only through precedents established by our courts (p. 192).

The court, after citing the note of Dean Bigelow in his edition of Story on Conflict of Laws (8th Ed., §637), refers pointedly to his ''criticism of such decisions as hold, in the absence of any evidence of the law of a foreign country, that there is a presumption of evidence that such country has the same law as the state or country of the forum. Or, to put the proposition a little differently, that in the absence of any evidence of the law of a foreign country, the court will administer the law of the forum, thus putting the burden of proof upon the party who would avoid the appli-

cation of the law of the forum to his case" (p. 191).

It is submitted that the Massachusetts decision involving, as stated in the opinion, merely the law "creating a liability upon a simple contract to pay money for a valuable consideration" (p. 194), is not an authority against the petitioner in the case now before this Court, but is, on the contrary, a favorable authority.

For it sufficiently appears from numerous decisions in the Federal Courts that the liability of an employer to an employee for personal injuries sustained in the course of the employment, is often governed by a variety of statutory provisions, including restrictions of the right of action, conditions precedent to bringing suit, limitations of the time within which suit may be brought, and specifications of peculiar remedies.

See *Slater* v. *Mexican R. R. Co.*, 194 U. S., 120;
Atch. Top. & Santa Fe R. R. Co. v. *Sowers*, 213 U. S., 55;
Mexican Central R. R. Co. v. *Chantry*, 136 Fed., 316.

In the present case not only has the plaintiff failed utterly to show that any cause of action arose in Cuba, but there is the added question as to whether, even though a cause of action should have arisen there, the laws of Cuba are not so dissimilar from the rules of the common law that the Circuit Court should have refused to assume jurisdiction in this case, as in the case of *Slater* v. *Mex. Nat. R. R. Co., supra.*

This point is very ably presented by Judge Gray in his dissenting opinion (Record, p. 92):

> "In the first place, there is nothing in either pleadings or proofs to show that the

plaintiff was clothed with a right of action under any law of the Republic of Cuba. In the next place, how are we to know, if there is any right of action at all, that it is not conferred by a statute whose limitations may be such as to render it not transitory, as was the case in Slater *v.* Mexican Nat'l Railroad Co. (supra)? There is nothing upon which to found the statement of the learned judge of the Court below, that 'in the present case, the right of action is not based on any statute of Cuba.' If presumption were allowable as to this, the only reasonable one would be that whatever right of action the plaintiff was clothed with, would be, as in Mexico and other Latin Countries, derived from the written law of a civil code. As we have already said, there could be no presumption that the common law, as enforced in the Federal Court for the District of New Jersey, was in force in Cuba, where the accident happened, and we cannot see how the plea of the general issue could relieve plaintiff from fully establishing the cause of action upon which he has brought suit."

Not only is there nothing upon which to found the statement of the trial judge that "in the present case, the right of action is not based on any statute of Cuba," but it is submitted that it could not have been based on anything else.

POINT V.

The precise presumptions requisite to sustain the judgments below have no proper legal basis.

As appears from the record, the action was tried upon the theory that the obvious risk as-

sumed by the plaintiff from the time of his employment up to the time when he testified that he reported to the defendant's superintendent that the governor of the engine, which caused the injury, was defective, was from that moment lifted from his shoulders and assumed by the defendant for such a period as would be a reasonable time for the defendant to make repairs to the defective governor (Record, pp. 48, 49, 56).

In charging the jury to that effect, the trial judge, as appears from his opinion on the motion for a new trial, applied the rule laid down in the comparatively recent case of *Andrecsik* v. *N. J. Tube Co.*, 73 N. J. Law, 664, in which a judgment for non-suit was sustained on the ground that, after the defendant had made a specific promise to repair the machinery at a definite time and this promise had not been carried out, the plaintiff, by returning to work after the time set for performance had expired, did so at his own risk. But the court also laid down a rule to the effect that, after a complaint by the servant and a promise to repair, the risk in the interim, between the time of the making of the promise and the date set for its performance, was that of the master and not of the servant (Record, pp. 56, 57).

While this may be the rule of the State Court of New Jersey, and adopted by both federal courts below, it is submitted that it is not the general rule even in this country.

The plaintiff's testimony in the case is that during six or seven months prior to the time of the accident, he saw the engine race four times, and that he feared an accident and told the superintendent that the governor was not working properly, and that he "was afraid it would cause trouble and an accident, and the shafting and the pulleys would not stand from the speed it was

running;" having seen pulleys burst from running too fast (Record, pp. 10, 12, 14 and 15).

The plaintiff had nothing whatever to do with the engine, except to start it in the morning, and stop it at noon, start it after lunch and stop it at night. His duties were not to work around the engine, but he was employed in the saw-filing department, seventy-five to eighty feet away. He was not an engineer, but a fellow servant had been hired "as fireman and engineer to look after the engine" (Record, pp. 8, 9, 10).

Under these circumstances, the general rule, as laid down by Labatt's Master and Servant, §428, p. 1210, is that, as the nature of the defects in the engine were such as to create an open imminent danger, such as no prudent man, careful of his life and limb, would risk, then it was not enough for him to draw the attention of the superintendent to the defect in order to relieve himself of all legal risk.

In *District of Columbia* v. *McElligott*, 117 U. S., 621, this Court, in reversing a judgment in favor of the plaintiff, defendant in error, said:

> "The plaintiff had had experience in the kind of business in which he was engaged at the time of his injury. He recognized from the beginning the peril to which he was exposed.
>
> * * * * * * * *
>
> "It was not implied in the contract between him and the District that he might needlessly or rashly expose himself to danger. * * *
>
> "If he exposed himself to dangers that were so threatening or obvious as likely to cause injury at any moment, he would, notwithstanding any promises or assurances of the District supervisor of the character al-

leged, be guilty of such contributory negligence as would defeat his claim for injuries so received'' (p. 633).

It further appears from the plaintiff's own testimony, that when the accident occurred he was not handling the engine in any way, but was in the saw-filing department, outside of the shop, and that when he saw that the engine was running too fast and that the engineer seemed unable to stop it, the plaintiff ran over to see if he could stop it, and to see what the trouble was, and that just as he got to the engine the pulleys overhead burst and a piece of one of the pulleys struck him on the hand (Record, pp. 9, 14).

It is submitted that under these circumstances, the rule applied by the Courts below that the plaintiff was relieved from the assumption of risk of injury due to the defective machinery after he had noticed the defect and received from the superintendent a promise to remedy the defect, is not applicable, since that rule can properly be applied only to cases where the servant is *necessarily* exposed to the dangers of that particular machinery.

Roccia v. *Black Diamond Mining Co.*, 121 Fed., 451; Circuit Court of Appeals, 9th Circuit (1903);

Showalter v. *Fairbanks Co.* (1894), 60 N. W., 257;

Cincinnati, etc. v. *Robertson,* 139 Fed., 519; Circuit Court of Appeals, 6th Circuit (1905);

Crookston Lumber Co. v. *Boutin,* 149 Fed., 680; Circuit Court of Appeals, 8th Circuit (1906);

H. D. Williams Cooperage Co. v. *Headrick,* 159 Fed., 680; Circuit Court of Appeals, 8th Circuit (1908).

It thus appears that neither the rule nor its application in this case is a matter of settled law in this country.

Certainly it is not a matter upon which there can be based any "broad general assumption of fact," such as that a contract creates a liability in all civilized countries.

How, then, in the absence of pleading or proof on the subject, could the trial court have known, and what right had it to presume, that the plaintiff, under the circumstances, would have had in Cuba, by the statutory law of that country, the benefit of a rule similar to that applied by the trial court?

The situation would have been the same on the theory of the plaintiff's pleading. The pleading was that while the plaintiff was employed to work in and about a planing-mill which the defendant was operating at Camaguey in Cuba, the engine which ran the mill and caused the injury was in an imperfect and defective condition, of which the defendant had notice and knowledge, but of which the plaintiff had no notice or knowledge, and that a strain was put upon the pulleys and shafting, which the pulleys were unsuitable and inadequate to stand, and that consequently the pulleys broke and one of the pieces injured the plaintiff; also that the defendant, being under the duty to use due and reasonable care to employ and engage and maintain a practical and experienced engineer to run and attend to the engine, had employed a man known to the defendant to be incompetent, inexperienced and wholly incapable of caring for and attending to said engine, and who had permitted the engine to become unmanageable, thus causing the strain to be placed upon the pulleys, which then and there broke, whereby one of the pieces or parts of the

pulleys struck and injured the plaintiff. (Declaration, Record, pp. 3, 4, 5.)

While the testimony of the plaintiff at the trial was to the contrary of his pleading, in that the plaintiff admitted repeated notice and knowledge of the alleged defect in the engine and had no complaint to make of the engineer employed by the defendant, yet *how, in the absence of pleading or proof on the subject, could any court in this country know or presume that the statutes of Cuba established a law governing the relations between master and servant and between servant and fellow-servant, by force of which an obligatio would arise under the circumstances pleaded? Or that in such a case a statutory remedy was there available to the plaintiff similar to that which he sought in this action?*

The circumstances of the present case afford, therefore, a complete demonstration of the soundness of the views expressed by Judge Gray in his dissenting opinion, as follows:

> "It is true that we may presume that in all civilized countries, negligence is unlawful, but it is another and quite different thing to presume that the 'law of negligence' is in all respects identical in all of them. No other subject is so fruitful of litigation or more prolific of nice distinctions. While it is very likely that harmful negligence is held to be culpable wherever legal wrongs are redressed, it is very unlikely that the law in respect to torts, in states governed by the civil code coincides with, and is without variance from, that where the common law prevails. Presumptions are resorted to for convenience in the administration of law, and in any case and for any purpose it is only probable and never the improbable, which the law

ventures to assume. I know of no authority questioning these propositions and of no decision binding upon this Court that controverts the logical conclusion therefrom (Record, pp. 93, 94)."

POINT VI.

The objection to the jurisdiction was not waived by a plea of the general issue.

The plaintiff's declaration, by showing that he relied on a cause of action alleged to have arisen in a civil law country, did not set forth facts sufficient to give the court jurisdiction. Under such circumstances the defendant could either demur or file the plea of the general issue and move to dismiss. The latter course was adopted and the motion to dismiss should have been granted. In *Crashley* v. *Press Publishing Co.* (1904), 179 N. Y., 27, Judge Gray, writing the opinion of the New York Court of Appeals affirming a judgment dismissing plaintiffs' complaint on the trial of the action said:

> "I think that the judgment below was right. Admitting all the material allegations of fact in the complaint, as we must, a case was not made out."

The trial court made the following statement (Record, p. 54): "It is a well-settled rule of pleading that if a court has not general jurisdiction of the subject matter of an action instituted before it, the defendant ought to plead to the jurisdiction

and that he cannot take advantage of it upon the general issue," citing *Mostyn* v. *Fabrigas*, Cowp., 161. But such is not the rule in the United States Courts since the Act March 3, 1875, c. 137, Sec. 5, 18 Stat., 472, which provides:

> "That if, in any suit commenced in a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, * * * the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed as justice may require, and shall make such order as to costs as shall be just."

This statute affects cases where the jurisdiction is based upon the nature of the subject matter as well as upon the character of the parties.

> *Rae* v. *Grand Trunk Ry. Co.*, 14 Fed., 401;
> Rose, Federal Procedure, Sec. 818.

In the present case the want of jurisdiction appeared from an inspection of the pleadings, and in such a case the court should dismiss of its own motion, and the question of jurisdiction need not be raised by plea.

> *Williams* v. *Nottawa*, 104 U. S., 209.

Here, however, defendant raised this question by three motions to dismiss (Record, pp. 20, 46 51 and 52).

POINT VII.

The authorities cited in the prevailing opinion in the Circuit Court of Appeals for the Third Circuit fail to sustain a judgment of affirmance.

Judge Archbald, in writing the prevailing opinion of the Circuit Court of Appeals for the Third Circuit, lays down the broad rule, "that in the "absence of proof of the foreign law, the court "will apply the law as it conceives it to be, accord-"ing to its idea of right and justice, or in "other words, according to the law of the forum" (p. 78). This rule the Circuit Court of Appeals for the Third Circuit holds to be applicable to statutory torts arising in a civil law jurisdiction, as well as local actions and actions in which the cause of action or the *res* is within the jurisdiction of the court.

The cases cited by Judge Archbald in support of this broad proposition naturally fall into five classes, and will be discussed in the order of classification.

The first class covers cases where the questions litigated concern the title to real property situated within the State.

Examples of this class are *Hynes* v. *McDermott*, 82 N. Y. 41 (an action of ejectment) and *Linton v. Moorhead*, 209 Pa., 646 (an action of ejectment).

The State has always been held to have authority to determine questions concerning the title to real property within its borders. The fact that the court will administer the local law where the question as to the title to real estate within the

State arises is not authority for the proposition that the court will administer the local law *to a transitory cause of action arising outside the jurisdiction of the court.*

In *Hynes* v. *McDermott,* for example, the court said (p. 47), with reference to what passed between an intestate and the adult plaintiff: "Part of it took place upon English soil; and it is conceded that it did not make a lawful marriage, according to the law of England. Part of it took place upon the sea in a vessel clearing from an English port and crossing the channel to a French port. Part of it took place in France * * *. There is no proof of what is the law of marriage in France, and we will not presume that it is different from that of this state." The court held that for the purpose of that action, there was a valid marriage. Can it be inferred from the language quoted, that the New York courts would take jurisdiction of an action for a personal injury sustained in a foreign country, the laws of which gave no remedy for such an injury?

The second class includes cases where the *res* or controversy arose within the State.

In such cases it is but natural that the court having jurisdiction of the subject matter, and of necessity having to decide the controversy, should apply its own rules of law in the absence of proof of the foreign law. Examples of such cases are as follows:

Brown v. *Gracey,* note to *Lacon* vs. *Higgins,* Dow & Ry. N. P. 41 (action on a promissory note made in Scotland).

Woodrow v. *O'Conner,* 28 Vt., 776 (Action on note given in Canada).

Monroe v. *Douglass,* 5 N. Y., 447 (Controversy over property within the State of New York).

Pratt v. *Roman Catholic Orphanage Asylum,* 20 N. Y. App Div, 352 (Bequest by New York testator to unincorporated association in England, and held void because void by local law, where there was a failure to prove that it was not void by English law).

Kittenthal v. *Mascagni,* 183 Mass., 19 (question of validity of peculiar provision of contract submitted on admitted facts to the courts of Massachusetts).

In none of these cases did a question like that now before the court arise. What was said in *Monroe* v. *Douglass* (*supra*) was that "the laws of the country to whose courts a party appeals for redress, furnish, in all cases, *prima facie,* the *rule of decision.*" But the court added: "The courts of a country are presumed to be acquainted only with their own laws; *those of other countries are to be averred and proved, like other facts of which courts do not take judicial notice*" (5 N. Y., p. 451). (Italics ours.)

What is now contended is that when redress is sought in our courts for personal injuries sustained in a country where the common law does not exist, averment and proof of some statute of that country giving a similar remedy is necessary to constitute a cause of action here. That is quite another matter from the application of the law of the forum as a "rule of decision" in a case where the subject matter is within the jurisdiction.

The case of *Davison* v. *Gibson,* 56 Fed., 443, is not opposed in principle to the rule of law contended for herein. In that case the plaintiff brought an action of *replevin* for personal prop-

erty of an intestate who was a citizen of the Creek nation. The United States statutes for the Indian Territory were applied by the Circuit Court on the ground *that the common law could not be presumed to exist in a foreign nation or country not settled by England or English colonies.*

In *Savage* v. *O'Neil,* 44 N. Y., 298, the question arose as to whether plaintiff or her husband was entitled to certain personal property. They had been married in Russia prior to the Married Women's Acts of 1848, and the question arose as to whether, under the common law, the husband became vested at once with the title to his wife's personal property. The court held that *there was no presumption that the common law existed in Russia and proceeded to apply the New York Statutes which allow a wife to retain her personal property as her separate estate.*

It is clear that the Davison and Savage cases are not authority for the proposition that the foreign law will be presumed to be like the law of the forum, for in both cases, where the property in controversy and the parties were before the court, both courts distinctly stated that they could not presume the common law to exist in foreign countries, and then proceeded to decide the local controversies pursuant to *the rules of decision* established by local statutes.

The third class of cases relied upon by the prevailing opinion groups cases in which the law of *England* and *Scotland* are presumed to be like the common law or commercial law of the State. Such cases are *Wickersham* v. *Johnson,* 104 Cal., 407 (English common law will be presumed to be the same as that of California); *Chase* v. *Alliance Ins. Co.,* 9 Allen, 311 (Massachusetts Commercial Law will be applied to charter party made

in Scotland where there is no proof of Scotch law).

The fourth class of cases embraces cases where the local court will furnish its own interpretation of and remedy for contracts entered into within its jurisdiction. Such cases are *Loaziza* v. *Superior Court,* 85 Cal., 11 (the court of equity took jurisdiction of a suit to rescind an executory contract made in California for the purchase of lands in Mexico—an application of the familiar equitable principle that a court of equity having jurisdiction of the parties will either enforce or rescind contracts), and *Carpenter* v. *Grand Trunk Railroad Co.,* 72 Me., 388.

In the *Carpenter* case, cited at some length by the prevailing opinion of the Circuit Court of Appeals for the Third Circuit (Record, p. 83). the court did not place its decision on the ground of any presumption of the Canadian law, but held that the contract was made in Maine, and the statute relied upon only abrogated the common law to the extent of tickets for transportation within the State of Maine. In construing the rights which arose under the Maine contract, the court said, at page 391:

> "We think a contract for the sale of a ticket may lawfully be made here, and may lawfully place a limitation upon the time within which it shall be used, other than that stated in the statute, if it is to be used in some other state or country, and that such limitation will be, *prima facie,* binding upon the purchaser; and that he can only avoid the *prima facie* effect of such limitation by showing that the law of the place where it was to be used did not permit it."

The fifth class of cases are cases in which dicta are relied upon by Judge Archbald in support of his proposition. Such cases are *Whitford* v. *Panama Railroad,* 25 N. Y., 465; *State* v. *Merrill,* 68 Vt., 60. In the *Merrill* case the question arose as to whether the defendant, who had stolen a team in Canada and brought it into Vermont, was guilty of larceny in Vermont. The court, at page 63, states that it is unnecessary to consider whether the defendant was guilty of larceny by the laws of Canada or not, saying:

> "For a hundred years our courts have held the common law to be, that one who steals property in another country and brings it into this State is guilty of larceny *here.*"

Further on the court says:

> "We cannot punish for offenses against a foreign law, but only for offenses against our law."

Thus it will be seen that the acts which took place in Canada, and the Canadian law relating to the same, were not in question, nor did they form a part of the crime against the laws of the State of Vermont.

The attitude of the Vermont courts in a case like the present is, as already shown, clearly set forth in *McLeod* v. *R. R. Co.,* 58 Vt., 727 (*supra,* p. 20).

In *Aslamian* v. *Dostumian,* 174 Mass., 328, the court was construing a Massachusetts contract, and held that there could be no presumption that *the law of Turkey was like that of Massachusetts.* Holmes, C. J., writing the opinion of the court, said:

> "There is a presumption that the common law as we understand it, is the common law, and often, if not always, that it is the law of other common law states; but there is no presumption that it prevails all over the world."

Judge Archbald's opinion states, in referring to this case, that it was held "whether the law of "negotiable paper was known in Turkey, requir- "ing the protection by protest of such an instru- "ment, was to be proved by the party who wished "to profit thereby" (p. 84).

Such is the rule contended for by the petitioner, The Cuba Railroad Company, but the respondent Crosby desires to predicate a right of action on facts which arose in a Civil Law jurisdiction. Such being the case, he should show that the law of master and servant, as understood in the district of New Jersey, existed in Cuba. As was stated in *Lloyd* v. *Guibert* (1865), L. R. 1 Q. B., 115, at p. 129:

> "In order to preclude all misapprehension, it may be well to add, that a party, who relies on a *right* or an exemption by foreign law, is bound to bring such law properly before the Court, and to establish it in proof."

The following cases do not readily fall within any branch of the foregoing classification, but they are not authority for the rule laid down by the Circuit Court of Appeals for the Third Circuit.

In *Sokel* v. *People,* 212 Ill., 238, a presumption was indulged in, on a trial for bigamy, that the first marriage of the defendant in Palestine,

which was shown to have been performed by a rabbi, was valid. Such presumption is not usually indulged in in criminal cases.

> *McCoombs* v. *State,* Texas Criminal Appeals, 99 S. W., 1017; 9 L. R. A. (N. S.), 1036, note; 16 L. R. A. (N. S.), 98 note; *Piers* v. *Piers,* 2 H. L., Cas., 331.

At page 244 it appears that the decision did not altogether rest on this presumption, but that there was some evidence that the first marriage was lawful in Turkey. The Illinois court did not presume that the law of Turkey was similar to the law of Illinois, but did presume that when the marriage ceremony was shown to have been performed *de facto,* it may be held to have been properly and legally performed. Such is the rule of presumption laid down in Jones on Evidence, section 86. At any rate, the defendant in the Sokel case was held to have committed a crime against the laws of the State of Illinois, and the court therefore, in a criminal prosecution, applied the law of the forum to the facts presented.

In *Dainese* v. *Hale,* 91 U. S., 13, referred to by the prevailing opinion in the Circuit Court of Appeals (Record, p. 85) action was brought in the Supreme Court of the District of Columbia to recover the value of certain chattels which the defendant, when he was Consul General of the United States in Egypt, caused to be attached in a controversy between Dainese and two other citizens of the United States. The defendant sought to justify his action in seizing the property, pleading that he was Consul General of the United States and that he was invested with judicial functions and powers over citizens of the United States residing

in Egypt, and that in the exercise of these functions he took cognizance of the controversy in question and issued the attachment complained of, and, also, that he was justified in doing so by the laws of Turkey.

Plaintiff demurred to this plea and was sustained by this Court. Mr. Justice Bradley, writing the opinion, said:

> "The transactions which are the subject of this suit took place in 1864; and the powers of our Consul-General in Egypt at that time must be regulated by the treaties with Turkey and by the laws of the United States then in force."

At that time the American Consuls had judicial authority in Turkey and Egypt. 12 U. S. Stat., 72, Act June 22, 1860, c. 179, Sections 1 and 2 provide:

> "To carry into full effect the provisions of the treaties of the United States with the empires of China, Japan, Siam, Egypt and Madagascar, respectively, the minister and the consuls of the United States, duly appointed to reside in each of the said countries, shall, in addition to other powers and duties imposed upon them, respectively, by the provisions of such treaties, respectively, be invested with the judicial authority herein described, which shall appertain to the said office of minister and consul, and be a part of the duties belonging thereto, wherein the same is allowed by treaty.
>
> "That in regard to crimes and misdemeanors, the said public functionaries are hereby fully empowered to arraign and try, in the manner herein provided, all citizens of the United States charged with offenses against law, which shall be committed in such coun-

> tries, respectively, and, upon conviction, to sentence such offenders in the manner herein authorized; and the said functionaries, and each of them, are hereby authorized to issue all such processes as are suitable and necessary to carry this authority into execution."

But they were liable for their torts. United States Statutes, Act June 22, 1860, c. 179, Sec. 23, 12 Stat., 76, provide:

> "All such officers shall be responsible for their conduct to the United States, and to the laws thereof, not only as diplomatic or consular functionaries respectively, but as judicial officers, when they perform judicial duties, and shall be held liable for all negligences and misconduct as public officers."

The facts in the present case clearly distinguish it from the *Dainese* case. That is not an authority against the contention of the petitioner, but is an authority in its support, for the tort there set forth in the complaint was a tort against the laws of the United States, although the facts constituting the tort actually took place in a foreign jurisdiction.

Defendant pleaded that he was justified by the laws of Turkey. This Court held that, inasmuch as defendant was relying upon foreign laws to establish his *affirmative* defense, he must plead and prove these foreign laws. In the present case, Crosby set forth a cause of action which was not a tort against the laws of the United States, inasmuch as the accident occurred in Cuba, and under the opinion in the *Dainese* case, in order properly to plead a cause of action, he should have *affirmatively* pleaded and proved the Cuban law giving him a cause of action.

The quotation relied upon by Judge Archbald from *The Scotland,* 105 U. S., 24, does not weaken the petitioner's contention. For if it be assumed that what was said about the law which French or Dutch tribunals would apply in the hypothetical case of a collision between British ships in British waters, if the British law was not shown, was more than a mere *dictum,* this case is far from being an authority on the subject of a tort arising in a civil law country, and under the laws which have exclusive force over the tort. That this case is not authoritative on the point under consideration in the present case is established by

Slater v. *Mexican Nat. R. R. Co.,* 194 U. S., 120;
Mexican Central Ry. Co. v. *Eckman,* 205 U. S., 538.
The American Banana Co. v. *United Fruit Co.,* 213 U. S., 347.

The cases of *Mexican Central Railroad* v. *Glover,* 107 Fed., 356, and *Mexican Central Railroad* v. *Marshall,* 91 Fed., 933, do not help the respondent in the present case. In the first place the law of the State of New Jersey is the common law, and never was the same as the law of Mexico; consequently there can be no presumption on that ground; and in the second place these two cases are overruled by the case of *Chouquette* v. *Mexican Cen. Ry. Co., Ltd.,* 156 Fed., 1022, and *Slater* v. *Mexican National R. R. Co.,* 194 U. S., 120.

The scope of the decision in the Slater case clearly appears from the dissenting opinion of the Chief Justice, concurred in by Justices Harlan and Peckham. From an examination of the prevailing and dissenting opinions it is clear that the *Slater* case laid down the rule, not only that the

act must be wrongful under the *lex loci delicti*, but that the remedy granted by the *lex loci* must be similar to the remedy known and administered by the Federal courts. Thus it will be seen that this Court goes even further than the English courts, which, in the recent case, *Machado* v. *Fontes* (1897), L. R., 2 Q. B., 542, and in *Philips* v. *Eyre* (1870), 40 L. J. Q. B., 28, hold that two facts must be proved with regard to a transitory action of the kind under discussion: one, that the wrong must be such in character that it would be actionable if committed in England, and the other, that the act must have been unlawful by the law of the place where it was done. To these two requisites this Court has added a third, viz.: that the remedy for the wrong must be of the same kind as the remedy which would be granted by the Federal courts.

The opinion of Judge Archbald cites with approval the English cases of *Scott* v. *Lord Seymour*, 1 Hurls. & Cort, 219, and *The Halley*, L. R., 2 P. C., 193, and otherwise seems to follow both the reasoning and the citations in the dissenting opinion in *Slater* v. *Mexican National Railroad* (*supra*). But it is submitted that the cases of *Scott* v. *Lord Seymour*, and *The Halley*, in so far as they may be construed in support of the rule laid down in this case below, have been disapproved by the prevailing opinion of this Court in the *Slater* case, in which the true rule is laid down as follows:

> "The theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which, like other obligations, follows the person and may be enforced wherever the person may be found.

Stout v. *Wood*, 1 Blatchf. (Ind.), 71; *Dennich* v. *Railroad Co.*, 103 U. S., 11, 18. But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation (*Smith* v. *Coudry*, 1 How., 28), but equally determines its extent" (194 U. S., 126).

Judge Archbald concludes his opinion as follows:

> "But above all, because of the rule which uniformly prevails, that, *in the absence of proof to the contrary and until the foreign law has been actually shown, the law of the land is to be applied*, the case in our opinion was correctly ruled at the trial, and should now be affirmed." (Italics ours.) (Record, p. 88.)

What is believed to be a sound criticism of this view is expressed by Dean Bigelow in a note to §637 of his edition of Story on Conflict of Laws (8th Edition, p. 863).

Commenting on the following statement in the text:

> "The established doctrine now is, that no court takes judicial notice of the laws of a foreign country, but they must be proved as facts,"

the learned editor says:

> "No principle in the law is more frequently affirmed than that stated in the text, that foreign laws are to be proved as facts. * * *
>
> "The principle is a thoroughly sound one, and ought to have been applied in many cases where it was disregarded or overlooked. It should not, of course, be strictly applied in all cases. Presumption has a proper place within limits in regard to foreign laws. Thus it

could not be necessary to give evidence that in a foreign country breach of contract, battery, conversion, or damage caused by fraud or negligence would give a right of action.***

"The presumption arises on grounds of probability, growing out of the fact that the law is known to be widespread *and uniform.* Nothing short of this should be sufficient to turn the burden of proof upon him who would deny the existence of such a law. There is no ground in principle for raising presumption upon a single fact, declaring for instance that because a law exists in the state of the forum it will be presumed in the absence of proof to exist in another state or country, or (what is the same thing) that *if evidence of the foreign law is not shown, the domestic law will be applied.* And yet language to this effect is constantly used in the books. (Citing cases, including a number cited with approval in the prevailing opinion below.) Many of these cases may have been correctly decided (some of them clearly were not), notwithstanding the form in which the rule of presumption is stated, for the law in question may have been *uniform and general* in other states or countries; but the presumption should have been based on that fact, and not on the fact of its existence in the state of the forum. That alone could create no probability of its existence elsewhere." (Italics ours.) (pp. 863, 864, 865.)

This sound criticism exactly applies to the ruling of the Circuit Court and of the majority of the Circuit Court of Appeals in this case, and explicitly challenges the ground upon which the decision of the latter court is avowedly based.

It is submitted, therefore, that under the decisions of this Court and of the Circuit Court of

Appeals for the Fifth Circuit, and in accordance with the best considered views of other courts and authorities, the well established rule is that, where a tort has arisen in a Civil Law country, the plaintiff, in order to prevent his suit in this country from being dismissed, must set forth in his declaration, and prove on the trial, not only the fact that an *obligatio* arose under the statute law of that country, but also its extent; and that failure to plead such fact is fatal to his action here, because it is a failure to plead a cause of action.

VIII.

The judgment of the Circuit Court of Appeals should be reversed and the Circuit Court should be directed to dismiss the action with costs.

HOWARD MANSFIELD,
Of Counsel for The Cuba Railroad Company, Petitioner.

HOWARD MANSFIELD,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 124.

THE CUBA RAILROAD COMPANY,
Petitioner,

vs.

WALTER E. CROSBY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT.

BENJAMIN M. WEINBERG,
EDWIN KALISH
Counsel for Respondent.

THE ESSEX PRESS, LAW PRINTERS, 916 MARKET STREET, NEWARK, N. J.

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 124.

CUBA RAILROAD COMPANY, *Petitioner,* *vs.* WALTER E. CROSBY, *Respondent.*	*On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.*

Brief of Benjamin M. Weinberg and Edwin Kalish for Respondent.

HISTORY OF THE CASE.

The petitioner (defendant below) is a New Jersey corporation, operating a railroad and maintaining car shops in the Republic of Cuba. The respondent is a citizen of the State of Tennessee, and was injured in Cuba while in the employ of the petitioner on the sixteenth day of June, nineteen hundred and six, by reason of the bursting of an overhead pulley, a piece of which struck him in the hand, injuring it so badly that it had to be amputated above the wrist. An action was brought in the United States Circuit Court for the District of New Jersey for injuries occasioned by the alleged negligence of the defendant, in maintaining a defective stationary engine, which overstrained the said

pulley and caused its explosion. The plaintiff was awarded a verdict for six thousand dollars.

A rule to show cause was obtained by the defendant below, why the verdict should not be set aside and the action dismissed, upon several grounds, one of which was that the plaintiff failed to plead and prove a right of recovery under the laws of Cuba. After argument before Judge Lanning in the Circuit Court, the motion for a new trial was denied and judgment for the plaintiff (respondent) was entered on the verdict.

A writ of error was thereafter sued out by the defendant to the United States Circuit Court of Appeals for the third Circuit to review the judgment of the trial court, which writ of error was dismissed, and the judgment of the lower court affirmed.

A petition was then filed in this court for a writ of certiorari, which writ was allowed and the case is now before this court to review the finding of the said Circuit Court of Appeals.

But one ground was stated by the petitioner in his application for a review of the judgment of the Circuit Court of Appeals, to wit:

That the trial court had no jurisdiction over the plaintiff's cause of action, because the tort upon which his action was based, occurred in Cuba, and there was neither allegation in the declaration, nor proof at the trial that under the lex loci delicti, the plaintiff was entitled to his action against the defendant.

Motions to dismiss for the above reason were made at the end of the plaintiff's case, and after the evidence was presented, both of which motions were denied.

It is now respectfully urged by the respondent

that neither the trial court nor the Circuit Court of Appeals committed any error in permitting the plaintiff's verdict, as returned by the jury, to stand, and the following in support thereof is submitted:

First: It was sufficient for the plaintiff to allege and prove a cause of action under the lex fori.

Second: If the defendant wished the benefit of some foreign law, it was its duty to plead and prove the same.

Third: In the absence of such proof by the defendant, the court will apply the law of the forum as it finds it.

Inasmuch as the questions above presented are so intimately interwoven, they will be considered together, and the single point made, that

IN THE ABSENCE OF PROOF OF THE FOREIGN LAW, THE LAW OF THE FORUM MUST FURNISH THE RULE OF DECISION.

Reasons for the Rule.

The respondent respectfully insists that the above rule is uniform in all the courts of this country, without one discordant note, the contention of the petitioner to the contrary notwithstanding.

Before discussing the law, the advisability or propriety of the rule stated, will be briefly considered.

Judge Archbold who wrote the majority opinion for the Circuit Court of Appeals said, "The question here is whether, a case having been established in all respects consonant with our ideas of right and justice, by which the plaintiff is thereby entitled to recover, according to the law as we understand it, we must stay our hands until the foreign law is shown. The question is not one peculiar to

the Federal Courts, nor to be disposed of by any special rule prevailing there. Neither is it confined to the subject of torts. It may arise as well in a suit with regard to a note or bond, a policy of insurance, an inheritance or a deed, and in each must receive similar treatment. However, perfect in any such instance therefore, the obligation may seem to be, no case is made out on which a verdict can stand, according to the doctrine which is contended for, unless at the same time the law of the foreign country where the obligation arose or the transaction took place, is first made to appear. * * * * * * The rule as advocated is, that no relief can be given, and that no case in fact exists, as there possibly would be if judged by the law of the forum, but that everything must be referred to the law where the transaction took place; according to which, if it was an uncivilized country and had no laws, there would be no right, nor any wrong to redress." (Record p. 78.)

This it seems to me more than meets the objection of the learned Judge Gray, who wrote the dissenting opinion of the Circuit Court of Appeals in this case, when he stated that, "It would indeed be a hard rule that would compel the defendant by affirmative plea and testimony, to assume the burden of proving a negative, by showing that there was no law justifying the action in Cuba." The learned Judge fails to point out, however, wherein the hardship or the injustice lies.

It is quite logical and more consistent with right and justice that one who is charged with the commission of an offence, recognized and admitted as being actionable under the laws of the country where both parties litigant are citizens and where the action is tried, should be asked to show by what

contrary law he seeks to escape punishment therefrom, then to ask the other to prove a double right of recovery, to wit, that he has, first, a right of recovery under the law of the place where his action is brought, for this he must do in the first instance; and secondly that he has a right of recovery under the laws of the country where the wrong was alleged to have taken place, and where perhaps no affirmative right of recovery can be shown, either because of lack of statute, code or precedent. It is self-evident that a contrary rule would lead to much mischief as many guilty defendants would be permitted to escape, simply because the plaintiff could not find a law, in the foreign country, upon which to predicate his action, although his right to recover in the trial forum is well established.

If it truly appeared by the defendant's plea that under the law of Cuba, the allegations in the plaintiff's declaration did not constitute actionable negligence in Cuba, or were authorized, justified or excused, then a different question would have been presented to the Court, viz., whether such a defence, which is contrary to natural justice, and the policy of our law, would be recognized.

Discussion of the Law.

It is well settled that if the law of the State or country in which the injury occurred is opposed to the public policy of the state or country in which the action is brought, that law will not be followed.

Scott vs. *Seymour*, 1 H. & C., p. 219.
Morisette vs. *Can. Pac. Ry. Co.*, 76, Vt., 267.
Walsh vs. N. Y. & N. E. Ry., 160, Mass., 571.
Whitford vs. *Pana. R. R.*, 25, N. Y., 465.

It was immaterial that the plaintiff failed to prove his right of recovery under the Cuban law, as

the court will presume, until otherwise proven, that the law of the place where the injury was inflicted, if such injury is predicated on the invasion of a generally known right, is the same as that prevailing in the trial forum.

Jones on Evidence 2nd Ed. Sec. 84, lays down the rule thus: "Where the rights of litigants are to be determined in this country, although those rights may be affected by proof of the law of a foreign country where the contract was made or the right acquired, in the absence of any such proof, the law of the forum must furnish the rule of decision."

Whart. Conflict Laws, Sec. 778, p. 1531, states the rule similarly, to wit: "Where there is no evidence as to the character of a foreign law, the courts will presume it to be the same as the domestic law; in other words in lack of such evidence, the courts will presume the law governing the case before them to be the same as the lex fori."

The same rule is stated in 13 Am. & Eng. Enc. Law, 2nd Ed. p. 1060-1061: "It is a general rule throughout the United States that in the absence of proof as to the laws of a sister state, they will be presumed to be the same as the lex fori. And the rule has been so extended as to apply to the laws of foreign countries." And in 9 Enc. Pl. and Pr. 543, it is stated that; "Where a foreign law is not properly pleaded and proved, the presumption is that it is the same as that of the state in which the action was brought."

A clear and succinct statement of this rule is found in *Monroe* vs. *Douglass*, 5 N. Y., 447, where the court, per Foot, J., said: "It is a well settled rule founded on reason and authority, that the lex fori, or in other words, the laws of the country to whose courts a party appeals for redress, furnish

in all cases prima facie, the rule of decision; and if either party wishes the benefit of a different rule or law, as for instance, the lex domicilii, lex loci contractus; or lex reisitae, he must aver and prove it." And in *Lloyd* vs. *Guibert,* L. R., 1 Q. B., 113, 129, it was said that: "A party who relies upon a right or an exemption by foreign law, is bound to bring such law properly before the court, and to establish it by proof. Otherwise, the court, not being entitled to notice such law without judicial proof, must proceed according to the law of England."

In *Savage* vs. *O'Neil,* 44 N. Y., 298, which was an action of trespass for taking in execution as the property of the husband, personal chattels which were claimed by the wife, the wife testified that she loaned to her husband money which she got from her mother in Russia, for which her husband by bill of sale, transferred the goods to her in question. The case turned on what her rights were to the money as against her husband under the Russian law. There was no proof of that law, but in the absence of it, it was held that the law of New York furnished the rule, thus following the earlier decision of *Monroe* vs. *Douglass,* Supra.

In the case of *Sokel* vs. *People,* 212 Ill., 238, the defendant was indicted for bigamy, it being charged that he had been married before at Safed, Palestine, Turkey, to prove which, it was shown that a marriage ceremony had been performed there by a Rabbi, the defendant being of the Jewish faith, and celebrated by the defendant's family and friends. He was at that time but fourteen years old, and coming to this country he later married another woman in New York with whom he was living when indicted in Illinois. It was essential, of course, to a conviction, to establish that the first

marriage was valid, and it was contended by the defendant that it was necessary, in order to do so, to prove that he was authorized by the laws of Turkey to contract a marriage in his then early age, and that what took place in fact constituted a marriage. But it was held that a public ceremony conducted by one in Holy Orders, purporting to marry the parties, followed by cohabitation, having been shown, the presumption was that the marriage so apparently contracted, was valid by the Turkish laws, and that if it was not, the laws of Turkey relied on to show the contrary should have been proved by him. Judge Archbold, in commenting on this case said: (Record p. 83.) "This case is a most significant one, because, in a criminal prosecution, while the rules of evidence, if anywhere, are strictly held, the presumption was indulged that in the absence of proof to the contrary, that which constituted a valid marriage in Illinois made out a valid marriage in Turkey, unless the opposite was shown."

An authoritative decision is to be found in the case of the Scotland 105, U. S., 24. The opinion was by Mr. Justice Bradley, who speaking for this court said, "In administering justice between parties, it is essential to know by what law, or code, or system of laws, their mutual rights are to be determined. When they arise in a particular country or state, they are generally to be determined by the laws of that state. Those pervade all transactions which take place where they prevail and give them color and legal effect. Hence if a collision should occur in British waters, at least between British ships, and the injured party should seek relief in our courts, we would administer justice according to the British law, so far as the

rights and liabilities of the parties were concerned, provided it were shown what that law was. If not shown, we would apply our own law to the case. In the French or Dutch tribunals they would do the same. But if a collision occurs on the high seas, where the law of no particular state has exclusive force, but all are equal, any forum, called upon to settle the rights of the parties, would prima facie, determine them by its own law, as presumptively expressing the rules of justice; but if the contesting vessels belong to some foreign nationality, the court would assume that they were subject to the law of their nation, carried under their common flag, and would determine the controversy accordingly. If they belonged to different nationalities having different laws, since it would be unjust to apply the laws of either to the exclusion of the other, the law of the forum, that is, the maritime law as received and practiced therein would properly furnish the law of decision. In all other cases, each nationality will administer justice according to its own laws."

Other cases holding similarly to those cited above and which are found in the Record pages 77 to 88 inclusive are:

Brown vs. *Gracey, Dow, and Ry.* N. P. 41, 16 Eng. Com. Law 426n.

Linton vs. *Moorehead,* 209 Penn. 646.

Scott vs. *Lord Seymour,* 1 H. & C. 219.

The "Halley" L. R. 2 P. C. 193.

Whitford vs *Panama R. R.* 25 N. Y. 465.

Hynes vs. *McDermott,* 82 N. Y. 41.

Mackey vs. *Mexican Central R. R.,* 78 N. Y. *Supp.* 966.

Pratt vs. *Roman Catholic Orph. Asy.,* 20,

N. Y. App. Div. 352 (46 N. Y. Supp. 1035) affirmed 166 N. Y. 593.

Carpenter vs. *Grand Trunk R. R.*, 72 Maine 388.

Woodrow vs. *O'Connor*, 28 Vt. 776.

McLeod vs. *Conn. R. R.*, 58 Vt. 727.

State vs. *Morrill*, 68 Vt. 60.

Loaziza vs. *Superior Court*, 85 Cal. 11.

Wickersham vs. *Johnson*, 104 Cal. 407.

Chase vs. *Alliance Ins. Co.*, 9 Allen 311.

Aslamian vs. *Dostumian*, 174 Mass. 328.

Mittenthal vs. *Mascagni*, 183 Mass. 19.

Dainese vs. *Hale*, 91 U. S. 13.

Davison vs. *Gibson*, 56 Federal 443 (5 C. C. A. 543).

Mexican Cen. R. R. vs. *Marshall*, 91 Federal 933, (34 C. C. A. 133).

Mexican Cen. R. R. vs. *Glover*, 107 Federal 365 (46 C. C. A. 334).

The following cases relied on by the petitioner have also been ably discussed, distinguished and approved by Judge Archbold, and the principle therein laid down found to be in accord with the cases above cited. They are as follows:

Crashley vs. *Press Publishing Co.*, 179 N. Y. 127.

Mexican Cen. Ry. Co. vs. *Chantry*, 136 Fed. 316.

Chouquette vs. *Mexican Cen. Ry. Co.* 156 Fed. 1022.

Mexican Cen. Ry. Co. vs. *Eckman*, 156 Fed. 1023; 205 U. S. 538.

Slater vs. *Mexican Nat. R. R. Co.*, 194 U. S. 120.

It was argued by Judge Lanning, who presided at the trial in the court below, that the question presented by the defendant in its motion to dismiss was a matter that should have been presented by means of a special plea or demurrer; that the right of action as disclosed by the plaintiff's declaration was not based upon any statute of Cuba, but rested upon the principles of the common law, and that the defendant by pleading the general issue had not denied the legal sufficiency of the allegations of the declaration. I quote from his opinion dismissing the rule to show cause.

"If the lex loci delicti does not give to the plaintiff a right of action, that defense should have been presented by a special plea and supported by proofs offered by the defendant. I do not think it was obligatory on the part of the plaintiff to set forth in his declaration in express terms what the special law of the Republic of Cuba on the subject of actionable negligence may be. He had the right to set forth a cause of action which, according to the law of the forum, would be complete, and in the event of a conflict between the lex loci and lex fori, the defendant ought to have shown by a proper plea that under the lex loci the plaintiff acquired no right of action. At any rate had such a plea or demurrer been interposed by the defendant, then the matter would have been disposed of in the trial court, and would not now be burdening this court. Had the defendant pleaded a law if there was any, showing that the plaintiff was not entitled to his right of action, then the question to be determined would have been whether, the trial court would have been compelled to follow it. Be that as it may the defendant below ought to be bound by the law of the forum, because of its failure to show non-liability." (Record p. 53.)

Judge Archbold practically voices the opinion expressed by the learned Judge Lanning, and concluding his opinion says: "The plaintiff, as already stated, made out a complete case under our law based on the established duty of the master to his servant, to exercise due care to supply him with reasonable safe machinery and appliances with which to work. This duty is not one imposed by statute, however it may be increasingly regulated or controlled thereby. It is one which has been evolved by the courts, out of the character of the relation as a matter of right and justice, which may thus be well assumed to be the law of every civilized land, until something different is shown, particularly where, as here, the rights of citizens of the same nationality are involved. And on this theory the case was tried, the plaintiff proving that which would ordinarily be regarded as sufficient to make out a case of negligence by which the defendant would be liable, and the defendant denying and endeavoring to meet this by charging the accident to the negligence of a fellow workman, and setting up the plaintiff's knowledge of the defect and assumption of the risk. Both parties thus planted themselves squarely on their respective rights at common law, recognizing, if not conceding, that they were to be so determined. It is true, that, at the close of the plaintiff's case and again when the evidence on both sides was in, a motion was made to dismiss the case on the ground which is now urged. But that does not change the fact, that as it was actually tried, it was treated as depending on and governed by the law as ordinarily understood. Not only because of that, but above all, because of the rule which uniformly prevails, that, in the absence of proof to the contrary and until the foreign law has been actually shown, the law of

the land is to be applied, the case in our opinion was correctly ruled at the trial, and should now be affirmed." (Record p. 87, bottom, &c.)

This seems to be the doctrine prevailing in England, as it appears from the following authorities.

Dicey in his work on the Conflict of Laws, 2nd Ed. (1908) p. 39, says: "The rights as respects procedure of the parties to a suit are utterly unaffected by any foreign law. If A a Frenchman sues X a German, on a contract made in Italy, in the High Court of Justice, he stands as regards procedure exactly in the same position as that occupied by Jones, a citizen of London, when he sues Brown also a Londoner, for the price of goods sold and delivered. To the idea of "Procedure" moreover, our courts give the widest extension. It includes process, evidence, rules of limitation, remedies, methods of execution and the like; the reason of this is clear. The practice of a court is determined by the views entertained in the country to which the court belongs, of the right method of compelling the attendance of the parties of obtaining evidence, &c., and the fact that the claim brought before the court contains a foreign element is no reason why the court should adopt methods of enforcing the plaintiff's right differing from the methods which the court or rather the Sovereign under whose authority the court acts, holds to be best adapted for the purpose in hand. Matters of procedure are in no sense rights of individuals. They are practices of a court, adopted in accordance with the courts' general views of expediency or of justice."

The case of *Scott* vs. *Lord Seymour* 1 H. & C., 219, was an action brought by the plaintiff, a British subject against the defendant, also a British subject for an assault and battery committed in

Italy. The defendant pleaded; First, that the alleged trespasses were committed in Italy; and Second, that by the law of Naples, no damages could be recovered in the civil action, until certain penal proceedings which had been commenced there, were determined, and the defendant found guilty.

It was therein declared by Justice Wightman, that he was not aware of any rule of law that would prevent a British subject from maintaining an action in England for damages against another British subject for assault and battery committed in a foreign country, merely because no damages for such an action were recoverable under the foreign law, and without any allegation that such trespass was lawful or justifiable in that country. It was found in that case, although the other justices did not agree in all that was said by Wightman, J., that the pleas were insufficient.

The only thing useful that may be extracted from that case, in so far of the consideration of the case in hand is concerned, is, that it was at no time suggested that it was the duty of the plaintiff to allege and prove what the law of Naples was. That was regarded and treated as a matter of defence, and the point nowhere raised or suggested that the plaintiff's declaration was insufficient. This case is one of many of similar character decided in the English courts.

In the case of the *M. Moxham*, 1 P. D. 107, the facts were these: An English Company was the owner of a pier located in Spain, which was run into by a ship of another English Company. The declaration alleged negligence in the navigation of the defendant's ship. To this declaration the defendant pleaded that by the law of Spain, the Master

and mariners of a ship, and not the owners were liable for the negligent operation of the same. The action was brought in the admiralty division. The trial judge held that the Spanish law was not applicable to the case and directed the answer to be reformed accordingly. On appeal the plea stood, and the defendant was permitted to have a commission issued to take testimony, showing the facts pleaded.

It will be noted in this case that there is no referrence to the fact that plaintiff showed or was obliged to show a right of recovery under the Spanish law, but that a plea setting up the desired defense was filed by the defendant.

The case of *The "Halley"* L. R. 2 P. C. 193, was the case of a collision between English ships in foreign waters. Under the law of England a right of action was conferred upon the ship owners, while under the plea filed it was shown that under the foreign law only the pilot was liable. Here again a plea setting up the foreign law was filed.

In *Philips* vs. *Eyre,* 4 Q. B. L. R. 225; 6 L. R. Q. B. 1 (1869) an action was brought in England to recover damages for an assault and battery, false imprisonment, &c., upon the plaintiff at his home in Jamaica. The defendant filed several pleas; the first one being: Not Guilty. The second one; justification and authority for the alleged trespass, &c. Then followed replication, demurrer, rejoinder, &c.

What was decided in those cases and the conclusions derived therefrom, is found in the case of *Machado* vs. *Fontes,* 2 L. R. Q. B. 542 (1897) also cited as 2 Q. B. (C. A.) 231-233 (1897) which seems to be the latest expression on the subject abroad, and which has been approved in our own courts. In that case the plaintiff brought his action to recover

damages from the defendant, for an alleged libel contained in a pamphlet in the Portugese language, alleged to have been published by the defendant in Brazil.

The defendant delivered a statement of defense in which he denied the libel and asked leave to amend his defense by adding a plea denying liability under the Brazilian law. Leave was given to file the plea and an appeal was taken on the ground that even if, by the law of Brazil a libel cannot be made the subject of civil proceedings in which the plaintiff could recover damages; according to the authorities an action would lie in England in respect of an act committed abroad, if such act is actionable where suit is brought, and not "justifiable" where committed. The appeal was allowed, and the defense overruled.

Lord Justice Lopes, after referring to the facts said: "Now the principle applicable in the present case appears to me to be this: Where the words have been published outside the jurisdiction, then, in order to maintain an action here on the ground of a tort committed in a foreign country, the act complained of must be wrongful, I use the word "wrongful"—deliberately—both by the law of this country, and also by the law of the country where it was committed. And the first thing we have to consider is whether those conditions are complied with.

"In case of *Philips* vs. *Eyre*, 4 Q. B. 225, Willes, J., lays down very distinctly what the requisites are in order to found such an action. He says this, "As a general rule in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled; first, the wrong must be of such a character that it would

have been actionable if committed in England. * * * Secondly, the act must not have been justifiable by the law of the place where it was done." Then in the *M. Moxham*, 1 P. D. 107, James L. J., in the course of his judgment uses these words. 'It is settled that if by the law of the foreign country, the act is lawful or is excusable, or even if it has been legitimized by a subsequent act of the Legislature, then this court will take into consideration, that state of the law—that is to say, if by the law of the foreign country a particular person is justified or is excused or has been justified or excused for the thing done, he will not be answerable here.'

"Both these cases seem to me to go to this length, that in order to constitute a good defense to an action brought in this country, in respect of an act done in a foreign country, the act relied on must be one which is innocent in the country where it was committed. In the present case there can be no doubt that the action lies for it complies with both of the requirements which are laid down by Willes, J. The act was committed abroad and is actionable here, and not justifiable by the laws of the place where it was committed."

Lord Justice Rigby, who also sat in the Machado case, and who agreed with his brother Lopes, said; "I think there is no doubt at all that an action (e. g.) a libel published abroad is maintainable here, unless it can be shown to be justified or excused in the country where it was published." After referring to the case of the M. Moxham and approving the decision therein, he says further: "We start then from this: that the act in question is *prima facie* actionable here, and the only thing we have to do is to see whether there is any peremp-

tory bar to our jurisdiction arising from the fact that the act we are dealing with it authorized or innocent or excusable in the country where it was committed. If we cannot see that, we must act according to our own rules in the damages (if any) which we may choose to give."

Dicey in the work referred to on p. 645, after setting forth the above opinions says: "Hence the question which was once debatable whether an action could be maintained in England for any tort done in a foreign country, unless it was strictly actionable, may now be considered to have received its answer. An action is maintainable in England for any act done in a foreign country, which would have been a tort if done in England, and is neither innocent, justifiable nor authorized by the law where the act is done."

Nor is the rule in this country contrary to that prevailing in England, although it is asserted by the petitioner that the following cases are authority for the rule, that the plaintiff must affirmatively show his right of recovery under the foreign law.

A case upon which much stress is laid is that of *Crashley* vs. *Press Publishing Co.*, 179 N. Y., 127; where an action of libel was brought by the plaintiff against the defendant for publishing an article in the "World" a newspaper published in New York City. It was said that the plaintiff while residing in Brazil, assisted in bringing about a revolution in that country. The complaint alleged that the plaintiff was a subject of the Queen of England residing in Brazil at the time of the publication of the article complained of. When the case was reached for trial, the complaint was dismissed; the trial judge holding that the allegations of the complaint were insufficient to establish that the

publication was libellous per se. Subsequently, the court of appeals in affirming the judgment of the lower court held, that the complaint under our laws did not show that the plaintiff was accused of committing a crime, as he was charged with aiding and abetting a movement against a foreign country, which could not be punishable here, and was, therefore, not libellous per se. (See discussion of this case p. 82 of Record).

The only difference between the decision in this case and that in *Machado* vs. *Fontes,* Supra, it seems to me is but this, to wit, that in the latter case the English court held that the allegations in the declaration made a *prima facie* case; whereas in the former, the court held that it did not.

The case of *Slater* vs. *Mexican Central R. R. Co.,* 194 U. S., 120, opinioned by Mr. Justice Holmes, does not touch the question considered here.

In that case the widow and children of one, Slater, who was killed through the negligence of the defendant company, in whose employ he was, instituted suit in the State of Texas for damages, basing the suit upon certain Mexican statutes in which the plaintiffs' right of action arose, and which further define the manner in which damages were recoverable, which damages under those laws were to be awarded in the nature of alimony and pensions. These laws were set forth by the plaintiffs. At the trial, however, it seems that the plaintiffs did not desire to be bound by the Mexican law, in regard to the manner in which the damages were to be awarded. The trial judge instructed the jury that the damages to be recovered, if any, were to be measured by the money value of the life of the deceased to the widow and children, and the jury returned a verdict for a lump sum apportioned to the several

plaintiffs. The judge and jury having acted in this regard under Texas statutes. The case was then taken to the Circuit Court of Appeals where the judgment was reversed and the action ordered to be dismissed, which ruling was upheld in this court.

Whatever was said by Mr. Justice Holmes, in that case it seems to me can have no application here.

The only point decided in that case was whether the plaintiffs having come into court relying upon the foreign law could abandon the same and recover under the law of the forum as to a part of their case.

The gist of what was decided is found in the following language of the court. "IT SEEMS TO US UNJUST TO ALLOW A PLAINTIFF TO COME HERE ABSOLUTELY DEPENDING ON THE FOREIGN LAW FOR THE FOUNDATION OF HIS CASE, AND YET TO DENY THE DEFENDANT THE BENEFIT OF WHATEVER LIMITATIONS ON HIS LIABILITY THAT LAW WOULD IMPOSE." And further on the opinion reads thus: "Therefore, we may lay on one side as quite inadmissible the notion that the law of the place of the act may be resorted to as far as to show that the act was a tort and that it may be abandoned, leaving the consequences to be determined according to the law of the place where the defendant may happen to be caught. We are aware that expressions of a different tendency may be found in some English cases, but they do not cover the question before this court."

There was a dissenting opinion by Chief Justice Fuller (Justices Harlan and Peckham concurring) which merely held that the method of distributing

damages was one of procedure or remedy, and that they are regulated by the law of the forum.

The case of *Mexican Central R. R.* vs. *Chantry,* 136 Fed. 316, was commented upon by Judge Archbold (Record p. 87) as follows:

"Nor is the case of *Mexican Central Railroad* vs. *Chantry,* 136 Fed. 316, in the same court, at variance with this. There, as in the others, the action was for personal injuries suffered by the plaintiff while employed by the defendant company as a railroad conductor in Mexico. But, differing from the others, the laws of that country were pleaded and proved, both these which gave the plaintiff a right of action, and those set up by the defendant, by which it was sought to be established in bar, that, by legal proceedings had in Mexico, it had been decided that there was no liability by reason of the accident, and that the plaintiff had thus no cause of action. It was with a case of that character that the court had to deal, and to it whatever was said was necessarily addressed. There is nothing as we view it which bears, one way or the other, on that which is involved here. But if there is, it is to be taken with the facts of the case in mind. It cannot be assumed, that there was any intention of qualifying the law, as it had been laid down by the same court in the cases which had gone before, where the question here in issue came squarely up and was decided."

The case of *Mexican Central R. R. Co.* vs. *Eckman,* 205 U. S., 536, the court distinguished as follows: (Record p. 86.)

"Neither is there anything which touches the question in *Mexican Central R. R.* vs. *Eckman,* 205 U. S. 536, which was ruled on the strength of the Slater case; the question there certified and passed

upon being simply whether the plaintiff, who had been injured while in defendant's service in Mexico, could recover without regard to the laws of that country, those laws having been put in evidence and proved, and showing the same character of liability discussed in the Slater case. Nor is the Court of Appeals of the Fifth Circuit to be regarded as having laid down any different rule."

The case of *Chouquette* vs. *Mexican Central R. R. Co.*, 156 Fed. 1022 (Supra), was decided by the Circuit Court of Appeals for the Fifth Circuit, at the same time that the Eckman case was decided and involved the same question as was certified in that case. It might be well to state just what was certified to the Supreme Court, by the United States Circuit Court of Appeals for the Fifth Circuit in the Eckman case. The question and answer as they appear in 205 U. S. 538 are as follows:

"In an action brought in the U. S. Circuit Court in and for the Western District of Texas, by a citizen of that District, against the Mexican Cen. Ry. Co., a corporation duly created under the laws of the State of Massachusetts and doing business in, and operating a steam railroad under continuous line in the State of Texas, and the Republic of Mexico, to recover for injuries to the plaintiff received while he was engaged in defendant's service, and whereby through defective appliance furnished by said railroad company, and the negligent operation of the said railroad in the Republic of Mexico, the said plaintiff at Ebano, Mexico, was injured and lost a leg. Can the court proceed to judgment and award such damages as upon proof may be assessed by a jury, notwithstanding the provisions of the laws of the Republic of Mexico proved on this trial, and recited in the statement of this case, and

which it is agreed, were the laws of Mexico applicable herein, in force and effect at the time of the injuries complained of?" This question was answered by this court in a per curiam as follows:

"Questions answered in the negative on the authority of *Slater* vs. *Mexican Nat. Ry. Co.*, 194, U. S. p. 120."

It is therefore respectfully submitted that inasmuch as the authorities are all one way, on the question certified to this court, and that the principle contended for by the respondent, is one which is in harmony with all of the adjudicated cases in this Honorable Court, the writ of certiorari be dismissed, and the judgment of the Circuit Court of Appeals for the Third Circuit be affirmed with costs.

BENJAMIN M. WEINBERG,
EDWIN KALISH,
Counsel for Respondent.

7

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 124.

THE CUBA RAILROAD COMPANY, *Petitioner,*
vs.
WALTER E. CROSBY, *Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Brief of Benjamin M. Weinberg and Edwin L. Kalish for Respondent, in answer to Brief of Petitioners.

The respondent answers the brief of the petitioner as follows:

First: The petitioner contends under its first point; (A) that plaintiff did not prove all the facts alleged in his declaration. Answer: Plaintiff was not obliged to do so. It is sufficient if, under the declaration, the plaintiff's evidence was admissible. Besides, no point was made of this at the trial. (B) As to petitioner's fear that a judgment recovered in the courts of this country could be no bar to a second action brought in Cuba, the answer is, that the defendant could plead judgment, payment, release, etc.

Second: The cases cited by petitioner under Point 4, to wit: Atchison T. & F. S. Ry. Co. vs. Sowers, 213, U. S. 55; American Banana Co. vs. United Fruit Co., 213 U. S. 347; Goodyear Tire and Rubber Co. vs. Rubber Tire Wheel Co., 164 Fed. 869, and others, are controlled by the decision of Slater vs. Mexican Nat. R. R. Co., and as pointed out do not touch the case at bar.

Parrott vs. Mexican Cent. R. R. Co., 207 Mass., 184, cited by the petitioner, stands for all that this respondent contends for, and is the latest authority for the rule laid down by the Circuit Court of Appeals, Third Circuit. This decision is authoritative, and is founded upon many of the authorities cited by this respondent in his brief, and does not run counter to the opinion in the Slater case, nor to any other good authority.

Third: The point attempted to be made by the petitioner under his fifth point, seems to be without foundation as to the facts stated. All cases containing the same elements as the case at bar have had a uniform principle applied to them in all the courts, so far as can be ascertained. One of the leading cases in this court is that of Hough vs. Texas and Pacific R. R. Co., 100 U. S. 13, where the court said: "If the servant having knowledge of a defect in machinery, gives notice thereof to the proper officer, and is promised that such defect shall be remedied, his subsequent use of the machinery, in the belief, well grounded, that it will be put in proper condition, within a reasonable time, does not necessarily or as a matter of law, make him guilty of contributory negligence. It is for the jury to say whether he was in the exercise of due care, in relying upon such promise, and in using the machinery, after knowledge of its defective or insufficient condition.

"The burden of proof in such case is upon the Company to show contributory negligence."

Fourth: The classification of the cases cited by respondent, if it proves anything, proves that the principle contended for by the respondent is a general one, and is applied in all matters in the common experience of the courts, which are, or ought to be, uniform in civilized nations. These various

and diverse causes, which are shown to be governed by this principle, are cited by the Supreme Court of Massachusetts, in the case of Parrott vs. Mexican Cen. R. R. Co., already mentioned, for just the opposite purpose to that suggested by the petitioner, viz: the uniformity of the application of the doctrine.

It cannot be the contention of the petitioner that the rule admitted to govern these cases should be narrowed down so as to exclude this particular case.

Almost every other matter seems to have been considered by the courts, and the principle allowed to prevail in them.

Rights arising out of negligent acts, are certainly recognized with more uniformity throughout the civilized world, than are rights arising out of oral contracts which was what the learned court of Massachusetts had before it in the case just mentioned.

At any rate this diversity, whatever it may show, does not prove that the doctrine so universally recognized should not be applied to respondent's case.

Respectfully submitted,

BENJAMIN M. WEINBERG,
EDWIN L. KALISH,
Counsel for Respondent.

8

United States Supreme Court,

OCTOBER TERM, 1909.

No. [redacted] 124

THE CUBA RAILROAD COMPANY,
Petitioner,

against

WALTER E. CROSBY,
Respondent.

Petition for Writ of Certiorari.

HOWARD MANSFIELD,
Attorney for Petitioner.

HOWARD MANSFIELD,
HENRY DE FOREST BALDWIN and
CHARLES D. MILLER,
Of Counsel.

B. H. TYRREL, PRINTER, 206-8 FULTON STREET, NEW YORK.

Supreme Court of the United States,

OCTOBER TERM, 1909.

THE CUBA RAILROAD COMPANY,
Petitioner,

against

WALTER E. CROSBY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI.

Requiring the Circuit Court of Appeals for the Third Circuit to certify to the Supreme Court for its review and determination the case of The Cuba Railroad Company, Plaintiff in Error, against Walter E. Crosby, Defendant in Error.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, The Cuba Railroad Company, shows to this Honorable Court, as follows:

First.—Your petitioner is a corporation, organized and existing under the laws of the State of New Jersey, owning and operating a railroad and sawmill in the Republic of Cuba.

4 On the tenth day of December, 1906, said respondent filed his declaration in an action at law against your petitioner in the Circuit Court of the United States for the District of New Jersey, in which cause your petitioner appeared and answered. Thereafter, on the 8th day of November, 1907, said cause came on to be tried before the Honorable William M. Lanning, a Judge of said Court, and a jury, and a verdict was rendered on said day by the jury against the defendant, your petitioner, in the sum of Six thousand dollars ($6,000).

5 *Second.*—Thereafter, on November 12, 1907, a rule to show cause why the verdict should not be set aside and the action dismissed, or a new trial granted, was entered herein. Said rule, however, was denied, and on the 18th day of April, 1908, final judgment was entered in favor of the plaintiff, the respondent herein, and against the defendant, your petitioner, for Six thousand dollars ($6,000), besides the costs of suit to be taxed.

Third.—To review this judgment your petitioner sued out a writ of error to the United States Circuit Court of Appeals, for the Third Circuit, some of the assignments of error being based upon
6 errors in the charge of the Judge of the Circuit Court; some particularly on the refusal of said Judge to dismiss the action for want of jurisdiction. Such proceedings were had in the said Circuit Court of Appeals that by opinion, filed May 17, 1909, said judgment was affirmed by a divided Court, Honorable Robert W. Archbald writing the prevailing opinion, in which Honorable George M. Dallas concurred, and Honorable George Gray writing the dissenting opinion.

Fourth.—Your petitioner believes that the judgment of the United States Circuit Court of Appeals for the Third Circuit is erroneous in the following particulars: 7

I.—The Court erred in failing to reverse the refusal of the Trial Court to direct a verdict for the defendant, your petitioner, on the following grounds:

> "That the Court has not jurisdiction of the alleged cause of action, because the alleged tort upon which this action was brought took place in Cuba, as appears by the declaration, and the plaintiff is not a resident of New Jersey, but is a resident of Cuba, and the defendant, while a New Jersey corporation, owns and operates a large plant in Cuba; that the Court should not take jurisdiction of this action, for it is brought on a cause of action alleged to have arisen in Cuba, and there has been no allegation or proof that under the *lex loci delicti* the acts alleged gave this plaintiff any right of action against the defendant, and the Court should not take jurisdiction on the assumption that the Common Law prevails in Cuba, for Cuba has not been settled by England or English colonies, and there is no presumption that the Common Law prevails there." 8 9

II.—The Court erred in failing to reverse the refusal of the Trial Court to dismiss the action after verdict on the following grounds:

> "1. That the Court has not jurisdiction of the alleged cause of action, because the alleged tort upon which this action is brought took place in Cuba, as appears by the declaration; and the plaintiff is not a resident of New Jersey, but is a resident of Cuba; and the de-

fendant, while a New Jersey corporation, owns and operates a large plant in Cuba.

2. The Court should not take jurisdiction of this action, for it is brought on a cause of action alleged to have arisen in Cuba, and there has been no allegation or proof that under the *lex loci delicti* the acts alleged gave this plaintiff any right of action against the defendant.

3. The Court should not take jurisdiction on the assumption that the Common Law prevails in Cuba, for Cuba has not been settled by England or English colonies, and there is no presumption that the Common Law prevails there."

III.—The Court erred in holding that the law of the forum will be applied to a cause of action arising in a civil law country, instead of holding that in a transitory action for personal injuries it must be shown that the laws of Cuba give a right of action, and that foreign laws are matters of fact which must be pleaded and proved.

Fifth.—Your petitioner further represents that, while the private interests involved in this action are large, the question decided by said Circuit Court of Appeals in its said decision is of gravity and general importance far beyond the personal interest of the parties, and that the decision, if erroneous and if permitted to stand unreversed, will introduce serious confusion and contradiction into the administration of the law, involving, as as they are believed to do, conflicts between the decisions of Federal Courts of different circuits, as will appear from the following brief statement of the facts presented and the points decided.

Sixth.—This was an action for personal in- 13
juries brought by the plaintiff, the respondent herein, an employee, against the defendant, your petitioner, for damages caused by the alleged negligence of said defendant in Cuba. While said defendant is a New Jersey corporation, the entire sphere of its operations is confined to the Island of Cuba, where it operates a sawmill and railroad, and the alleged negligence of the defendant occurred in Cuba. The plaintiff in his declaration set forth a common law cause of action, alleging that defendant "was engaged in operating and conducting a planing mill at Camaguey in the Republic of Cuba," and that said plaintiff was in- 14
jured "at Camaguey in the Republic of Cuba, to wit, at Trenton, in the District of New Jersey aforesaid." The plaintiff did not set forth any statute of the Republic of Cuba giving him a right of action on the facts alleged in his declaration. The defendant entered plea of the general issue. At the end of the plaintiff's case, defendant, your petitioner, moved to dismiss the action on the ground that it clearly appeared that the plaintiff had made out no cause of action over which the Trial Court had jurisdiction. Said motion was denied by the Trial Judge.

When the case closed, defendant moved to in- 15
struct the jury in favor of defendant, on the ground that the Court had no jurisdiction, because it had not been proved that the law of Cuba gave any right of action on the facts in evidence. After verdict in favor of the plaintiff, defendant moved to set aside the same and enter judgment for the defendant notwithstanding the verdict, on the ground that the Court had no jurisdiction, because it had not

16 been proved that the law of Cuba gave any right of action on the facts in evidence. This motion was also denied, the Trial Judge holding that the defendant, by filing the plea of the general issue, waived the objection that the facts alleged did not set forth a cause of action.

Seventh.—On appeal to the United States Circuit Court of Appeals for the Third Circuit, judgment of the United States Circuit Court for the District of New Jersey was affirmed by divided Court.

Judge Archbald writing the prevailing opin-
17 ion, laid down the rule to be applied in cases like the present one, as follows:

> "That in the absence of proof of the foreign law, the Court will apply the law as it conceives it to be, according to its own idea of right and justice; or in other words, according to the law of the forum."

Judge Gray dissented on the ground that the plaintiff had failed to prove a cause of action, and stated the rule as follows:

> "It is clear, therefore, that the existence of an obligation and the right to its enforce-
18 ment by the foreign law is essential to a valid cause of action in the trial forum, and the general rule in this country and in England undoubtedly is the one which flows logically from the premises, viz, that the existence of such obligation under the foreign law must be alleged and proved in the domestic forum; otherwise no cause of action is made to appear to the Court. In such cases, the foreign law must be proved as a fact; otherwise the plaintiff fails to make out his cause of action, which is the obligation imposed on the defendant by that law and by that law alone."

Eighth.—It is submitted that said decision herein of the United States Circuit Court of Appeals for the Third Circuit is in conflict, in respect to the application of the principles governing the bringing of actions in one of the United States by persons injured in civil law countries, with the decisions of the United States Circuit Court of Appeals for the Fifth Circuit in the cases of *Mex. Central Ry. Co.* v. *Chantry, reported in 136 Fed., 316, 321;* [illegible]*uette* v. *Mexican Central Ry. Co., Ltd., reported in 156 Fed., 1022,* and *Mexican Central Ry. Co., Ltd.,* v. *Eckman, reported in 156 Fed., 1023.* 19 20

Ninth.—It is submitted that said decision herein is also in substantial conflict, in respect to the principles applicable to that question, with the decision of the Supreme Court of the United States in the case of *Slater* v. *Mex. Natl. R. R. Co.,* in which the opinion of the Supreme Court by Mr. Justice Holmes is reported in 194 U. S., 120.

Tenth.—Your petitioner files herewith a certified copy of the transcript of the record, including therein all the proceedings of the United States Circuit Court of Appeals for the Third Circuit in said cause. 21

WHEREFORE your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding the said Court to send to this Court on a day certain to be therein designated, a full and complete transcript of the record of all proceedings of the said Circuit Court of

Appeals in the said case therein, entitled The Cuba Railroad Company, plaintiff in error, against Walter E. Crosby, defendant in error, No. 19, October Term, 1908, to the end that said cause may be reviewed and determined by this Court as provided in Sec. 6 of the Act of Congress entitled "An Act to Establish Circuit Courts of Appeals and to define and regulate in a certain case the jurisdiction of the Court of the United States, and for other purposes," approved March 3, 1901; and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem appropriate and in conformity with said Act, and that said judgment of said Circuit Court of Appeals in said cause and every part thereof, may be reversed by this Honorable Court, and your petitioner will ever pray, &c.

THE CUBA RAILROAD COMPANY,
Petitioner,

By WM. C. VAN HORNE,
President.

HOWARD MANSFIELD,
Attorney for Petitioner.

HOWARD MANSFIELD,
HENRY DEFOREST BALDWIN, and
CHARLES D. MILLER,
Of Counsel.

STATE OF NEW YORK,
County of New York, } ss.: 25

WILLIAM C. VAN HORNE, being duly sworn, deposes and says: I am the president of The Cuba Railroad Company, the petitioner above named. The foregoing petition is true of my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters, I believe it to be true.

WM. C. VAN HORNE.

Sworn to before me this
2[illegible] day of July, 1909. } 26

EASTON S. BACON,
Notary Public,
[SEAL.] New York County.

27

No. [redacted] 124

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 585.

THE CUBA RAILROAD COMPANY,
Petitioner,

vs.

WALTER E. CROSBY,
Respondent.

BRIEF FOR PETITIONER ON APPLICATION FOR WRIT OF CERTIORARI.

HOWARD MANSFIELD,
HENRY DE FOREST BALDWIN,
CHARLES D. MILLER,
Of Counsel for Petitioner.

B. H. TYRREL, PRINTER, 206-8 FULTON STREET, NEW YORK.

Supreme Court of the United States.

THE CUBA RAILROAD COMPANY,
Petitioner,

against

WALTER E. CROSBY,
Respondent.

October
Term, 1909.
No. 585.

Brief for Petitioner on Application for Writ of Certiorari.

This is an application for a writ of certiorari to require the Circuit Court of Appeals for the Third Circuit to certify to this Court for its review the case of The Cuba Railroad Company, plaintiff in error, against Walter E. Crosby, defendant in error.

Facts.

This is an action for personal injuries, brought by the plaintiff, the respondent herein, an employee, against the defendant, The Cuba Railroad Company, the petitioner, for damages caused by the alleged negligence of said defendant in Cuba.

The Cuba Railroad Company, while it is a corporation organized and existing under the laws

of the State of New Jersey, confines its sphere of operation to the Island of Cuba, where it owns and operates a railroad and, in connection with its car shops and general shops, a planing-mill and mechanical department (Record, p. 8).

The plaintiff sets forth in his declaration a common law cause of action, alleging that defendant "was engaged in operating and conducting a planing-mill at Camaguey, in the Republic of Cuba" (Record, p. 3), and that said plaintiff was injured "at Camaguey, in the Republic of Cuba, to wit, at Trenton, in the District of New Jersey aforesaid" (Record, p. 4). The plaintiff did not plead nor prove any Statute of the Republic of Cuba giving him a right of action on the facts alleged in his declaration. The defendant entered the plea of the general issue. At the end of the plaintiff's case, the defendant, the petitioner, moved to dismiss the action on the ground, among other grounds, that there had been no allegation or proof that under the *lex loci delicti* the acts alleged gave the plaintiff a right of action against the defendant. The court overruled the motion for a non-suit, not being certain about the point raised on the law of Cuba, but being in doubt on that point, and stated that a similar motion might be entertained later (Record, p. 24).

When the case closed, the defendant moved to instruct the jury in favor of defendant, on the ground, among other grounds, that the Court had not jurisdiction, because it had not been proved that the law of Cuba gave a cause of action on the facts as shown by the evidence (Record, p. 54).

The motion was denied, and the case went to the jury. After verdict in favor of the plaintiff for six thousand dollars ($6,000), defendant obtained a rule requiring the plaintiff to show cause why the

verdict should not be set aside and the action dismissed or a new trial granted, on the following grounds, among others (p. 81):

> "1. That the court has not jurisdiction of the alleged cause of action, because the alleged tort upon which this action is brought took place in Cuba, as appears by the declaration; and the plaintiff is not a resident of New Jersey, but is a resident of Cuba; and the defendant, while a New Jersey corporation, owns and operates a large plant in Cuba.
>
> 2. The court should not take jurisdiction of this action, for it is brought on a cause of action alleged to have arisen in Cuba, and there has been no allegation or proof that under the *lex loci delicti* the acts alleged gave this plaintiff any right of action against the defendant.
>
> 3. The court should not take jurisdiction on the assumption that the Common Law prevails in Cuba, for Cuba has not been settled by England or English colonies, and there is no presumption that the Common Law prevails there."

This motion was also denied, and judgment for the plaintiff was entered on the verdict (p. 77).

On writ of error the judgment of the District Court was reviewed by the United States Circuit Court of Appeals for the Third Circuit, Judge Archbald handing down an opinion, in which Judge Dallas concurred, for the affirmance of the judgment below, and Judge Gray handing down a dissenting opinion for reversal.

The plaintiff in error now files its motion with the clerk of this Court for a writ of *certiorari* to review the determination of the court below, filing at the same time copies of the records and papers required by the rules of this Court.

POINT I.

The question here involved is of such general importance as to merit a review by this Court.

It is well known that a great many corporations are organized in the various States of the United States for the purpose of doing business in Spanish America. As a rule, the entire plant of such corporations is in the country in which they operate, and all their property and employees are there. Whenever an accident occurs to an employee or a third person, the natural place in which to seek redress is the local tribunal. As said by this court in *Slater* v. *Mexican National R. R. Co.*, 194 U. S., 120, 129, "The case is not one demanding extreme measures like those where a tort is committed in an uncivilized country," and in Cuba, as in Mexico, it is to be presumed that the courts are open to plaintiffs, if the statute confers a right upon them.

The Spanish American countries derive their law from the Roman law, and it is contained in Statutory Codes; consequently any liability which may arise from a defendant's acts must, if it arises at all, derive its force from some statute. If the person injured, who has voluntarily taken up his residence in the civil law country, desires to bring suit on a transitory action, he can, if the decision in question be allowed to stand, come to the United States and set forth a cause of action at common law without pleading or proving that he had *any right of action* at all by the law of the land where he had resided, or showing that it was the kind of right of action which would be enforcible in our courts.

Yet this Court has held, in *Slater* v. *Mexican National R. Co., supra,* that, as a prerequisite to the granting of any remedy for a right arising under the civil law, our courts must be satisfied that the right is similar to the right given by the laws of the state in which the action is brought. In order to open the courts of this country to *transitory* actions arising in a foreign country and under a foreign law, the plaintiff should be compelled to set forth facts sufficient to show that by the *lex loci delicti* an *obligatio* arose which is similar to the *obligatio* recognized by our courts.

A practical objection to allowing actions of this kind to be brought by a plaintiff hundreds of miles from the scene of the accident is, as was a fact in the present case, that the plaintiff can come into court and testify before a jury, while the defendant must usually rely on depositions in order to present its defense. Should a defendant bring the necessary witnesses into this jurisdiction, it would, in many cases, cause a virtual suspension of its operations. The rule laid down by the Circuit Court of Appeals, Third Circuit, has never before been followed, and should this decision, here sought to be reviewed, be allowed to stand, it will tend greatly to increase the burdens of corporations organized in the United States to do business in foreign countries.

An illustration of the disadvantage under which such corporations may be required to defend actions for personal injuries arising in foreign countries may be found in the present case. The plaintiff in his declaration avers that he was injured in consequence of the "imperfect and defective condition of a stationary engine which the defendant was operating at Camaguey and of the

overhead pulleys and shafting connected with the engine, "*of which condition the said plaintiff had no notice or knowledge*" (Record, p. 4). Also that the plaintiff was injured in consequence of the employment by the defendant of a man "*known to the said defendant to be incompetent, inexperienced and wholly incapable of caring for and attending to said engine, to take charge of said engine, and to run, look after and care for the same,*" who "*permitted the said engine to be and become unmanageable and to 'race' or 'run away,' thus causing a severe strain to be placed upon the said pulley, which then and there broke, whereby one of the pieces or parts of said pulley struck the said plaintiff in his hand*" and otherwise injured the plaintiff (Record, p. 5). The testimony taken for the defendant by commission was to the effect that the engine was a new one and in good condition (pp. 31, 45), and was installed by the plaintiff himself (pp. 39, 46) and that the man who was alleged in the declaration to be incapable, had been retained in his position with the approval and on the request of the plaintiff (p. 35).

But when the plaintiff came to testify, on the trial, he said that *he had noticed* that the governor of the engine "*failed to work properly sometimes,*" and that *he had noticed* that "*the same thing happened some three times before the accident*" and that *he had notified* the superintendent "*that the governor was not working properly,*" and that he "*was afraid it would cause trouble and an accident*" (Record, pp. 13, 14). The plaintiff gave no testimony and offered no evidence that the man complained of in the declaration was in any way unfit for his position or that the accident was in any degree due to his incompetency.

Of course, it was not within the power of the defendant on the trial to produce witnesses to meet the testimony given in support of the new theory of the plaintiff's case.

POINT II.

There is a conflict between the decision of the Circuit Court of Appeals for the Third Circuit in this case and the decisions of other Federal Courts.

A number of cases have come up for review before the United States Circuit Court of Appeals for the Fifth Circuit involving the right to bring in the United States Circuit Court against a corporation organized and existing under the laws of one of the States of the American Union a transitory action for personal injuries received in Mexico.

The rule of law relating to these cases is stated in *Mexican Central Ry. Co.* v. *Chantry*, 136 Fed., 316 (Circuit Court of Appeals for the Fifth Circuit, 1905, at p. 321), as follows:

> "To recover in this transitory action for the alleged personal injuries, it must be shown that the laws of Mexico give a right of action. Foreign laws are matters of fact, and, like other facts, must be pleaded and proved."

On the contrary the principle applied to such transitory actions by the United States Circuit Court for the Third Circuit is as follows:

> "In the absence of proof of the foreign law, the Court will apply the law as it conceives it to be, according to its own idea of right and justice; or in other words according to the laws of the forum" (Record, p. 94).

It is plain that these two rules are absolutely inconsistent.

It seems inconceivable that if an action similar to this were brought in the Fifth Circuit, the Judges of that Circuit would follow the rule laid down in the present case. It is submitted that if it can be said that there is no conflict on this question between the Circuit Court of Appeals for the Third Circuit and the Circuit Court of Appeals for the Fifth Circuit, it may equally be said that there is no conflict between Judge Archbald and Judge Gray.

In two recent cases in the United States Circuit Court of Appeals for the Fifth Circuit, *Chouquette* v. *Mexican Central Ry. Co., Ltd.*, 156 Fed. 1022 and *Mexican Cen. Ry. Co. Ltd.* v. *Eckman*, 156 Fed. 1023, plaintiff brought suit on states of facts which would have established common law torts, and attempted to obtain redress in the Federal Courts, although apparently there would have been no redress in the Mexican courts. Both appeals were dismissed.

(For the full scope of the decisions in these actions see the record on appeal and briefs before the Circuit Court of Appeals for the Fifth Circuit, U. S. C. C. of App. Records and Briefs, vols. 261, 263.)

These cases show that the Federal Courts will not take jurisdiction of transitory actions for injuries inflicted in a foreign country, merely because, if inflicted in a common law country, they would be common law torts.

This Court has in two cases laid down principles of law and applied them in such a way as to be directly in conflict with the rule as stated by Judge Archbald, as above set forth.

In *Slater* v. *Mexican National R. R. Co.*, 194 U. S. 120, Mr. Justice Holmes in writing the opinion of this Court said:

> "We assume for the moment that it was sufficiently alleged and proved that the killing of Slater was a negligent crime within the definition of Article 11 of the Penal Code, and therefore, if the above sections were the only law bearing on the matter, that they created a civil liability to make reparation to any one whose rights were infringed.
>
> "As Texas has statutes which give an action for wrongfully causing death, of course there is no general objection of policy to enforcing such a liability there, although it arose in another jurisdiction. *Stewart* v. *Baltimore & Ohio R. R.* 168 U. S. 445. But when such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in any degree is subject to the *lex fori*, with regard to either its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operative outside its own territory. The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which, like other obligations, follows the person, and may be enforced wherever the person may be found. *Stout* v. *Wood*, 1 Blackf. (Ind.) 71; *Dennick* v. *Railroad Co.* 103 U. S. 11, 18. But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation (*Smith* v. *Condry*, 1 How. 28), but

> equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose."

The Circuit Court of Appeals for the Third Circuit, however, has held in the present case that whether an *obligato* arose or not depends, not upon the *lex loci delicti,* but upon the law of the forum. This is in substantial conflict with the decision of this court in *Mexican Central Ry. Co.* v. *Eckman,* 205 U. S. 538, which held that, even though a citizen of Texas were injured in Mexico while in the employ of the defendant railroad company (a Massachusetts corporation operating its railroad in Texas and Mexico) through defective appliances furnished by said railroad company, the plaintiff could not recover unless he were given a right of action by the laws of Mexico. The decision of the court in that case is controlling in the present one. The facts were similar—a tort in a foreign jurisdiction, which would have been a tort at common law, was relied upon as the basis for a suit in the Federal courts, but this court laid down the rule that the Federal courts will not take cognizance of such a tort arising in a civil law jurisdiction, unless the acts complained of be shown to have given rise to an *obligatio* in the jurisdiction where the alleged cause of action arose.

POINT III.

The grounds on which the opinion of Judge Gray is based show the importance of having this case reviewed.

Judge Gray in his dissenting opinion favoring the reversal of the judgment below said:

> "It is clear, therefore, that the existence of an obligation, and the right to its enforcement by the foreign law, is essential to a valid cause of action in the trial forum, and the general rule in this country and in England undoubtedly is the one which flows logically from the premises, viz., that the existence of such obligation under the foreign law *must be alleged and proved in the domestic forum; otherwise, no valid cause of action is made to appear to the court.* In such cases, the foreign law must be proved as a fact; otherwise, the plaintiff fails to make out his cause of action which is the obligation imposed on the defendant by that law, and by that law alone" (Italics ours, Record, p. 108).

Judge Gray clearly points out that the decision of the United States Circuit Court of Appeals for the Third Circuit is in direct conflict with the decisions of the United States Circuit Court of Appeals for the Fifth Circuit, and with the principles enunciated by this Court in the case of *Slater* v. *Mexican National R. R.*, 194 U. S. 120.

POINT IV.

There is no reason why the Circuit Court should have assumed jurisdiction in this case.

The plaintiff was in Cuba at the time the accident happened, and he testified that he had been working there for some years before he went into the employment of defendant. He went to Cuba for his health eight years ago and still resides there (Record, pp. 8, 71, 72 and 73). The defendant's operations are entirely confined to Cuba, where it owns and operates a planing-mill in connection with its steam railroad, and all defendant's property is situated there. Not only is this so, but all the witnesses on which the defendant must rely are non-residents of the State of New Jersey and reside in Cuba. And it must be assumed that the system of law in Cuba is adequate for the protection of its residents or that, at any rate, whenever a Federal court is asked to take cognizance of such a suit as this, the court should become satisfied that the state of facts alleged in the declaration would, if proved, give rise to a wrong by the *lex loci delicti* for which this plaintiff could bring an action. The plaintiff gives no reason for leaving the forum appropriate to both parties, and bringing suit in the Federal court; and it is submitted that the plaintiff should do one of two things: either bring suit in Cuba and pursue his remedy there or bring suit in the Federal courts only upon alleging and proving that he had a cause of action under the laws of Cuba. It is not for the Federal court to pass upon what ought to be the law in a foreign country, for a man

who goes to a foreign country and resides there submits himself to the laws of that country and can have no greater rights than are given him by such laws.

The court should not take jurisdiction in this case for another reason—a judgment in this suit might not bar a suit in Cuba. Under the laws of the United States a judgment is final, and satisfaction will bar a second suit. There is nothing here to show that a judgment recovered in the United States courts would bar any right of action which the plaintiff might have in Cuba. The result might be that the defendant would be compelled to pay damages twice for the same injury.

THE RULE IS THAT THE LEX LOCI DELICTI DETERMINES WHETHER THERE IS A CAUSE OF ACTION.

The common law rule, which is in force both in England and the United States, is that in order to justify a court in taking jurisdiction and giving a remedy for an act committed without the territorial jurisdiction of the court, it must appear that the act complained of was not justifiable under the local law. This rule is expressed in *Machado* v. *Fontes* (1897), L. R. 2 Q. B., 542, as follows:

> "The general principle is, that in order that an action may be maintained in this country in respect of a tort committed outside the jurisdiction the act complained of must be a wrongful act, both by the law of this country and by the law of the country where it was committed."

In *Phillips* v. *Eyre* (1870), 40 L. J. Q. B. 28, the court said (p. 40):

> "As a general rule, in order to found a suit in England, for a wrong alleged to have been committed abroad, two conditions must be fulfilled—First, the wrong must be of such a character that it would have been actionable if committed in England. * * * Secondly, the act must not have been justifiable by the law of the place where it was done."

To the same effect are:

> *Coyne* v. *Southern Pac. Co.* (1907), 155 Fed., 683.
> Minor's Conflict of Laws, Sec. 202.
> Dicey on the Conflict of Law;
> American Notes by J. B. Moore, pp. 659, 670.

In Cooley on Torts (3rd ed.), p. 900, it is stated:

> "But it is agreed that to support an action (for a foreign tort) the act must have been wrongful or punishable where it took place, and that whatever would be a good defense to the action if brought there, must be a good defense everywhere."

In this case there is no allegation or proof that a master is liable under the Cuban law for the negligence complained of by this plaintiff, and even though the act alleged in this declaration should render the master liable, it does not appear that he would be liable to a civil rather than to a penal action, or that his action was not barred by a statute of limitations.

Our courts can take judicial notice that Cuba was not settled by England or her colonists, but that it formed a part of the Spanish possessions, and that the Civil Law obtains there. It is a mat-

ter of common knowledge that the Civil Law is a written law derived from the Roman law and embodied in codes which are adopted by statute, and consequently that all the rights and remedies that arise in a Civil Law country are based directly on statutory enactments.

> Chase's Blackstone (3rd ed., pp. 46, 47).
> *Banco de Sonora* v. *Bankers Mut. Cas. Co.* (Iowa), 95 N. W., 232.

It is admitted that if the plaintiff had alleged and proved that he had a right of action under the Civil Law of Cuba, then the court could give him his remedy (*Evey* v. *Mexican Cen. R. R. Co.*, 81 Fed., 294), provided that neither the right of action nor the remedy was dissimilar from the right of action and remedy at common law.

In *Northern Pacific R. R.* v. *Babcock*, 154 U. S., 190, the opinion of this Court cited with approval the opinion of the court in *Herrick* v. *Minn. & St. L. Ry. Co.*, 31 Minn., 11, as follows:

> "The statute of another state has, of course, no extraterritorial force, but rights acquired under it will always, in comity, be enforced, if not against the public policy of the laws of the former. In such cases the law of the place where the right was acquired, or the liability was incurred, will govern as to the *right of action.*"

In *Slater* v. *Mexican Natl. Ry. Co.*, 194 U. S., 120, this Court refused the enforcement of a Mexican statute, although the statute was fully set forth in plaintiff's petition. The ground of this refusal was that the Mexican statute was so dissimilar from that in force in Texas, the place

where the suit was brought, as to be incapable of enforcement by the Federal courts in Texas.

Under the pleadings here, the only ground on which plaintiff can be held to have pleaded or proved a cause of action is that there is a presumption that the common law in force in the District of New Jersey was in force in Cuba; but there can be no such presumption in the plaintiff's favor, for there is no presumption that the common law prevails in Cuba or that any rights given by the common law exist in that country.

As the United States Circuit Court of Appeals stated in *Davison* v. *Gibson*, 56 Fed. 443:

> "It is very well settled that it will not be presumed that the English common law is in force in any State not settled by English colonists."

See also *Savage* v. *O'Neil*, 44 N. Y. 298; *Aslanian* v. *Dostumian*, 174 Mass. 328.

To the same effect is a recent New York case, *Crashley* v. *Press Publishing Co.*, 179 N. Y., 27. In this case, the plaintiff, a resident of Brazil, sued a New York newspaper for libel on the ground that an article published in said newspaper in New York City, charging the plaintiff with treason to the government of Brazil, was libelous *per se*. The New York Court of Appeals affirming the judgment dismissing the complaint, said at page 32:

> "The article was not libelous *per se*. To complain of an article as being libelous, because charging the complainant with taking part in a revolt, or rebellion, within the government of Brazil, is quite insufficient, in the absence of an allegation of the existence of some statute, making such an act a treasonable offense and prescribing pains, or penalties, for the commission of the crime. The

court cannot assume that the laws of Brazil are similar to the common law upon the subject of treason to the State. That the plaintiff was an alien resident within the government of Brazil is not material, in considering his right of action; inasmuch as his alienage may not, probably would not, have been available as a defense. (See case of *McLean*, 26 How. State Trials, 747.) *The difficulty is that the complaint does not allege what was the law of Brazil, with respect to the commission of the acts charged in the article,* and the presumption that the common law is in force is only indulged in by our courts with reference to England and those states which have taken the common law from England. (*Savage* v. *O'Neil*, 44 N. Y., 298.)" (Italics ours.)

In *McLeod* v. *Railroad Company*, 58 Vt., 727, the plaintiff sued to recover for personal injuries alleged to have been sustained in the Province of Quebec. The basis of the plaintiff's claim was a Canadian statute which plaintiff did not plead in detail. On appeal, the court affirmed the judgment sustaining a demurrer and said:

"Although a civil right of action acquired or liability incurred in one state or country for a personal injury may be enforced in another to which the party in fault may have removed, or where he may be found, yet the right of action *must exist under the laws of the place where the act was done or neglect accrued.* If no cause or right of action for which redress may be had exists in the country where the personal injury was received, then there is no cause of action to travel with the person claimed to be in fault which may be enforced in the State where he may be found" (p. 735).

* * *

> "Courts do not take judicial notice of foreign laws or laws of other states; and when a foreign law is relied upon as establishing a duty or right of action, it must be set forth in the declaration and proved as a fact" (p. 737).
>
> * * *
>
> "It is not enough to state what the pleader deems to be the conclusion of the law as to the duty of the defendant. It is essential that the foreign law from which the alleged duty springs should be so fully set forth that the court may see that the duty is established" (p. 739). (Italics ours.)

Such is the case here. The respondent seeks to enforce a liability which, if it arose at all, arose by virtue of the Cuban statute, but he has not pleaded that statute.

In deciding adversely the motion to set aside the verdict, the trial court seemed to recognize the rule that in an action to recover damages for a wrongful act committed in a jurisdiction governed by statutes, instead of the common law, the statutes conferring the right of action must be both pleaded and proven by him who asserts the right, but held that it was incumbent upon the defendant in the present case to show by plea that under the *lex loci* the plaintiff acquired no right of action, citing in support of this view, the case of *Scott* v. *Lord Seymour,* 1 H. & C., 219. But in that case it did not appear from the declaration, as in the present case, that the tort took place in a civil law country. It should seem that a defendant is not called upon to controvert any substantial matter which is not either alleged in the declaration or based upon necessary presumption. Here it was neither alleged that the plaintiff had

a cause of action under the law of Cuba, nor could it be presumed that the statutes of Cuba, where the court must take judicial notice that there was no common law, gave the plaintiff, under the facts alleged, either the same or substantially the same remedy as that which he was seeking in the Federal court for the District of New Jersey.

The plaintiff Crosby, having alleged a transitory action arising in a civil law country, but failing to plead or prove that the acts complained of gave rise to any *obligatio*, the judgment should have been reversed by the Circuit Court of Appeals for the Third Circuit, and the action dismissed.

Mexican Cen. R. R. Co. Ltd. v. *Eckman,* (1906) 205 U. S. 538;

Chouquette v. *Mexican Cen. R. R. Co. Ltd.*. (Circuit Court of Appeals, 5th Circuit 1907) 156 Fed. 1022;

Mexican Cen. R. R. Co. Ltd. v. *Eckman,* (Circuit Court of Appeals, 5th Circuit 1909). 156 Fed. 1023.

Slater v. *Mex. Natl. R. R.* 194 U. S. 120.

POINT V.

The authorities cited in the prevailing opinion in the Circuit Court of Appeals for the Third Circuit fail to sustain a judgment of affirmance.

Judge Archbald, in writing the prevailing opinion of the Circuit Court of Appeals for the Third

Circuit, lays down the broad rule, "that in the "absence of proof of the foreign law, the court "will apply the law as it conceives it to be, accord- "ing to its own idea of right and justice, or in "other words, according to the law of the forum" (p. 94). This rule the Circuit Court of Appeals for the Third Circuit holds to be applicable to statutory torts arising in a civil law jurisdiction, as well as local actions and actions in which the cause of action or the *res* is within the jurisdiction of the court.

The cases cited by Judge Archbald in support of this broad proposition naturally fall into five classes, and will be discussed in the order of classification.

The first class covers cases where the questions litigated concern the title to real property situated within the State.

Examples of this class are *Hynes* v. *McDermott,* 82 N. Y., 41 (an action of ejectment) and *Linton* v. *Moorhead,* 209 Pa., 646 (an action of ejectment).

The State has always been held to have authority to determine questions concerning the title to real property within its borders. The fact that the court will administer the local law where the question as to the title to real estate within the State arises is not authority for the proposition that the court will administer the local law *to a transitory cause of action arising outside the jurisdiction of the court.*

In *Hynes* v. *McDermott,* for example, the court said (p. 47), with reference to what passed between an intestate and the adult plaintiff: "Part of it took place upon English soil; and it is conceded that it did not make a lawful marriage, according to the

law of England. Part of it took place upon the sea in a vessel clearing from an English port and crossing the channel to a French port. Part of it took place in France * * *. There is no proof of what is the law of marriage in France, and we will not presume that it is different from that of this state." The court held that for the purpose of that action, there was a valid marriage. Can it be inferred from the language quoted, that the New York courts would take jurisdiction of an action for a personal injury sustained in a foreign country, the laws of which gave no remedy for such an injury?

The second class includes cases where the *res* or controversy arose within the State.

In such cases it is but natural that the court having jurisdiction of the subject matter, and of necessity having to decide the controversy, should apply its own rules of law in the absence of proof of the foreign law. Examples of such cases are as follows:

Brown v. *Gray*, note to *Lacon* vs. *Higgins*, Dow & Ry. N., p. 41 (action on a promissory note made in Scotland).

Woodrow v. *O'Conner*, 28 Vt., 776 (Action on note given in Canada).

Monroe v. *Douglass*, 5 N. Y., 447 (Controversy over property within the State of New York).

Pratt v. *Roman Catholic Orphanage Asylum*, 20 App. Div., 352 (Bequest by New York testator to unincorporated association in England, and held void because void by local law, where there was a failure to prove that it was not void by English law).

Mittenthal v. *Mascagni*, 183 Mass., 19 (Question of validity of peculiar provision of contract sub-

mitted on admitted facts to the courts of Massachusetts).

In none of these cases did a question like that now before the court arise. What was said in *Monroe* v. *Douglass* (*supra*) was that "the laws of the country to whose courts a party appeals for redress, furnish, in all cases, *prima facie*, the *rule of decision.*" But the court added: "The courts of a country are presumed to be acquainted only with their own laws; *those of other countries are to be averred and proved, like other facts of which courts do not take judicial notice*" (5 N. Y., p. 451). (Italics ours.)

What is now contended is that when redress is sought in our courts for personal injuries sustained in a country where the common law does not exist, averment and proof of some statute of that country giving a similar remedy is necessary to constitute a cause of action here. That is quite another matter from the application of the law of the forum as a "rule of decision" in a case where the subject matter is within the jurisdiction.

The case of *Davison* v. *Gibson*, 56 Fed., 443, is not opposed in principle to the rule of law contended for herein. In that case the plaintiff brought an action of *replevin* for personal property of an intestate who was a citizen of the Creek nation. The United States statutes for the Indian Territory were applied by the Circuit Court on the ground *that the common law could not be presumed to exist in a foreign nation or country not settled by England or English colonies.*

In *Savage* v. *O'Neil*, 44 N. Y., 298, the question arose as to whether plaintiff or her husband was entitled to certain personal property. They had

been married in Russia prior to the Married Women's Acts of 1848, and the question arose as to whether, under the common law, the husband became vested at once with the title to his wife's personal property. The court held that *there was no presumption that the common law existed in Russia, and proceeded to apply the New York Statutes which allow a wife to retain her personal property as her separate estate.*

It is clear that the Davison and Savage cases are not authority for the proposition that the foreign law will be presumed to be like the law of the forum, for in both cases, where the property in controversy and the parties were before the court, both courts distinctly stated that they could not presume the common law to exist in foreign countries, and then proceeded to decide the local controversies pursuant to *the rules of decision* established by local statutes.

The third class of cases relied upon by the prevailing opinion groups cases in which the law of *England* and *Scotland* are presumed to be like the common law or commercial law of the State. Such cases are *Wickersham* v. *Johnson,* 104 Cal., 407 (English common law will be presumed to be the same as that of California); *Chase* v. *Alliance Ins. Co.,* 9 Allen, 311 (Massachusetts Commercial Law will be applied to charter party made in Scotland where there is no proof of Scotch law).

The fourth class of cases embraces cases where the local court will furnish its own interpretation of and remedy for contracts entered into within its jurisdiction. Such cases are *Loaiza* v. *Superior Court,* 85 Cal., 11 (The court of equity took

jurisdiction of a suit to rescind an executory contract made in California for the purchase of lands in Mexico—an application of the familiar equitable principle that a court of equity having jurisdiction of the parties will either enforce or rescind contracts), and *Carpenter* v. *Grand Trunk Railroad Co.*, 72 Me., 388.

In the *Carpenter* case, cited at some length by the prevailing opinion of the Circuit Court of Appeals for the Third Circuit (pp. 99, 100), the court did not place its decision on the ground of any presumption of the Canadian law, but held that the contract was made in Maine, and the statute relied upon only abrogated the common law to the extent of tickets for transportation within the State of Maine. In construing the rights which arose under ths Maine contract, the court said, at page 391:

> "We think a contract for the sale of a ticket may lawfully be made here, and may lawfully place a limitation upon the time within which it shall be used, other than that stated in the statute, if it is to be used in some other state or country, and that such limitation will be *prima facie,* binding upon the purchaser; and that he can only avoid the *prima facie* effect of such limitation by showing that the law of the place where it was to be used did not permit it."

The fifth class of cases are cases in which dicta are relied upon by Judge Archbald in support of his proposition. Such cases are *Whitford* v. *Panama Railroad,* 23 N. Y., 465; *State* v. *Morrill,* 68 Vt., 60. In the *Morrill* case the question arose as to whether the defendant, who had stolen a team in Canada and brought it into Vermont, was guilty of larceny in Vermont. The court, at page

63, states that it is unnecessary to consider whether the defendant was guilty of larceny by the laws of Canada or not, saying:

> "For a hundred years our courts have held the common law to be, that one who steals property in another country and brings it into this State is guilty of larceny here."

Further on the court says:

> "We cannot punish for offenses against a foreign law, but only for offenses against our law."

Thus it will be seen that the acts which took place in Canada, and the Canadian law relating to the same, were not in question, nor did they form a part of the crime against the laws of the State of Vermont.

The attitude of the Vermont courts in a case like the present is, as already shown, clearly set forth in *McLeod* v. *R. R. Co.*, 58 Vt., 727.

In *Aslanian* v. *Dostumian*, 174 Mass., 328, the court was construing a Massachusetts contract, and held that there could be no presumption that *the law of Turkey was like that of Massachusetts.* Holmes, C.J., writing the opinion of the court, said:

> "There is a presumption that the common law as we understand it is the common law, and often, if not always, that it is the law of other common law states; but there is no presumption that it prevails all over the world."

Judge Archbald's opinion states, in referring to this case, that it was held "whether the law of "negotiable paper was known in Turkey, requir- "ing the protection by protest of such an instru-

"ment, was to be proved by the party who wished "to profit thereby" (p. 101).

Such is the rule contended for by your petitioner, The Cuba Railroad Company, but the respondent Crosby desires to predicate a right of action on facts which arose in a Civil Law jurisdiction. Such being the case he should show that the law of master and servant, as understood in the district of New Jersey, existed in Cuba. As was stated in *Lloyd* v. *Guibert* (1865), L. R. 1 Q. B., 115, at p. 129:

> "In order to preclude all misapprehension, it may be well to add, that a party, who relies on a *right* or an exemption by foreign law, is bound to bring such law properly before the Court, and to establish it in proof."

The following cases do not readily fall within any branch of the foregoing classification, but they are not authority for the rule laid down by the Circuit Court of Appeals for the Third Circuit.

In *Sokel* v. *People*, 212 Ill., 238, a presumption was indulged in, on a trial for bigamy, that the first marriage of the defendant in Palestine, which was shown to have been performed by a rabbi, was valid. Such presumption is not usually indulged in in criminal cases.

McCoombs v. *State,* Texas Criminal Appeals, 99 S. W., 1017; 9 L. R. A., N. S., 1036, note; 16 L. R. A., N. S., 98, note.

Piers v. *Piers,* 2 H. L., C. A. S., 331.

At page 244 it appears that the decision did not altogether rest on this presumption, but that there was some evidence that the first marriage was law-

ful in Turkey. The Illinois court did not presume that the law of Turkey was similar to the law of Illinois, but did presume that when the marriage ceremony was shown to have been performed *de facto*, it may be held to have been properly and legally performed. Such is the rule of presumption laid down in Jones on Evidence, section 86. At any rate, the defendant in the Sokel case was held to have committed a crime against the laws of the State of Illinois, and the court therefore, in a criminal prosecution, applied the law of the forum to the facts presented.

In *Dainese* v. *Hale*, 91 U. S., 13, referred to by the prevailing opinion in the Circuit Court of Appeals (p. 102), action was brought in the Supreme Court of the District of Columbia to recover the value of certain chattels which the defendant, when he was Consul General of the United States in Egypt, caused to be attached in a controversy between Dainese and two other citizens of the United States. The defendant sought to justify his action in seizing the property, pleading that he was Consul General of the United States and that he was invested with judicial functions and powers over citizens of the United States residing in Egypt, and that in the exercise of these functions he took cognizance of the controversy in question and issued the attachment complained of, and, also, that he was justified in doing so by the laws of Turkey.

Plaintiff demurred to this plea and was sustained by this Court. Mr. Justice Bradley, writing the opinion, said:

> "The transactions which are the subject of this suit took place in 1864; and the powers of our Consul-General in Egypt at that time must be regulated by the treaties with Tur-

key and by the laws of the United States then in force."

At that time the American Consuls had judicial authority in Turkey and Egypt. 12 U. S. Stat., 72, Act June 22, 1860, c. 179, Sections 1 and 2 provide:

> "To carry into full effect the provisions of the treaties of the United States with the empires of China, Japan, Siam, Egypt and Madagascar, respectively, the minister and the consuls of the United States, duly appointed to reside in each of the said countries, shall, in addition to other powers and duties imposed upon them, respectively, by the provisions of such treaties, respectively, be invested with the judicial authority herein described, which shall appertain to the said office of minister and consul, and be a part of the duties belonging thereto, wherein the same is allowed by treaty.
>
> That in regard to crimes and misdemeanors, the said public functionaries are hereby fully empowered to arraign and try, in the manner herein provided, all citizens of the United States charged with offenses against law, which shall be committed in such countries, respectively, and, upon conviction, to sentence such offenders in the manner herein authorized; and the said functionaries, and each of them, are hereby authorized to issue all such processes as are suitable and necessary to carry this authority into execution."

But they were liable for their torts. United States Statutes, Act June 22, 1860, c. 179, Sec. 23, 12 Stat., 76, provide:

> "All such officers shall be responsible for their conduct to the United States, and to the laws thereof, not only as diplomatic or consular functionaries respectively, but as judi-

> cial officers, when they perform judicial duties, and shall be held liable for all negligences and misconduct as public officers."

The facts in the present case clearly distinguish it from the *Dainese* case. That is not an authority against the contention of the petitioner, but is an authority in its support, for the tort there set forth in the complaint was a tort against the laws of the United States although the facts constituting the tort actually took place in a foreign jurisdiction.

Defendant pleaded that he was justified by the laws of Turkey. This Court held that, inasmuch as defendant was relying upon foreign laws to establish his *affirmative* defense, he must plead and prove these foreign laws. In the present case, Crosby set forth a cause of action which was not a tort against the laws of the United States, inasmuch as the accident occurred in Cuba, and under the opinion in the *Dainese* case, in order properly to plead a cause of action, he should have *affirmatively* pleaded and proved the Cuban law giving him a cause of action.

The cases of *Mexican Central Railroad* v. *Glover,* 107 Fed., 356, and *Mexican Central Railroad* v. *Marshall,* 91 Fed., 933, do not help the respondent in the present case. In the first place the law of the State of New Jersey is the common law, and never was the same as the law of Mexico; consequently there can be no presumption on that ground; and in the second place these two cases are overruled by the cases of *Chouquette* v. *Mexican Cen. Ry. Co., Ltd.,* 156 Fed., 1022, and *Slater* v. *Mexican National R. R. Co.,* 194 U. S., 120. The scope of the decision in the Slater case clearly appears from the dissenting opinion written by the

Chief Justice and concurred in by Justices Harlan and Peckham. From an examination of the prevailing and dissenting opinions it is clear that the *Slater* case laid down the rule, not only that the act must be wrongful under the *lex loci delicti*, but that the remedy granted by the *lex loci* must be similar to the remedy known and administered by the Federal courts. Thus it will be seen that this Court goes even further than the English courts, which, in their recent cases, *Machado* v. *Fontes* (1897), L. R., 2 Q. B., 542, and *Philips* v. *Eyre* (1870), 40 L. J. Q. B., 28, hold that two facts must be proved with regard to a transitory action of the kind under discussion: one, that the wrong must be such in character that it would be actionable if committed in England, and the other, that the act must not have been unlawful by the law of the place where it was done. To these two requisites this Court has added a third, viz.: that the remedy for the wrong must be of the same kind as the remedy which would be granted by the Federal courts.

The opinion of Judge Archbold cites with approval the English cases of *Scott v. Lord Seymour*, 1 Hurls. & Cort, 219, and *The Halley*, L. R., 2 P. C., 193, and otherwise seems to follow both the reasoning and the citations in the dissenting opinion in *Slater* v. *Mexican National Railroad* (*supra*). But it is submitted that the cases of *Scott* v. *Lord Seymour*, and *The Halley*, in so far as they may be construed in support of the rule laid down in this case below, have been disapproved by the prevailing opinion of this Court in the *Slater* case, in which the true rule is laid down as follows:

> "The theory of the foreign suit is that, although the act complained of was subject to

> no law having force in the forum, it gave rise to an obligation, an *obligatio,* which, like other obligations, follows the person and may be enforced wherever the person may be found. *Stout* v. *Wood,* 1 Blatchf. (Ind.), 71; *Dennich* v. *Railroad Co.,* 103 U. S., 11, 18. But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation (*Smith* v. *Coudry,* 1 How., 28), but equally determines its extent" (194 U. S., 126).

Consequently, where the statutory tort arises in a Civil Law country, the plaintiff, in order to prevent his suit from being dismissed, must set forth in his declaration, and prove on the trial, not only the fact that an *obligatio* arose, but also its extent. Failure to plead such fact is fatal to his action, because it is a failure to plead a cause of action.

POINT VI.

A writ of certiorari should issue to the Circuit Court of Appeals for the Third Circuit to certify to this Court for its review and determination the case of the Cuba Railroad Company, plaintiff in error, against Walter E. Crosby, defendant in error.

HOWARD MANSFIELD,
HENRY DEFOREST BALDWIN,
CHARLES D. MILLER,
Of Counsel for Petitioner.

/0

Supreme Court of the United States

OCTOBER TERM, 1909

No. [redacted] 124

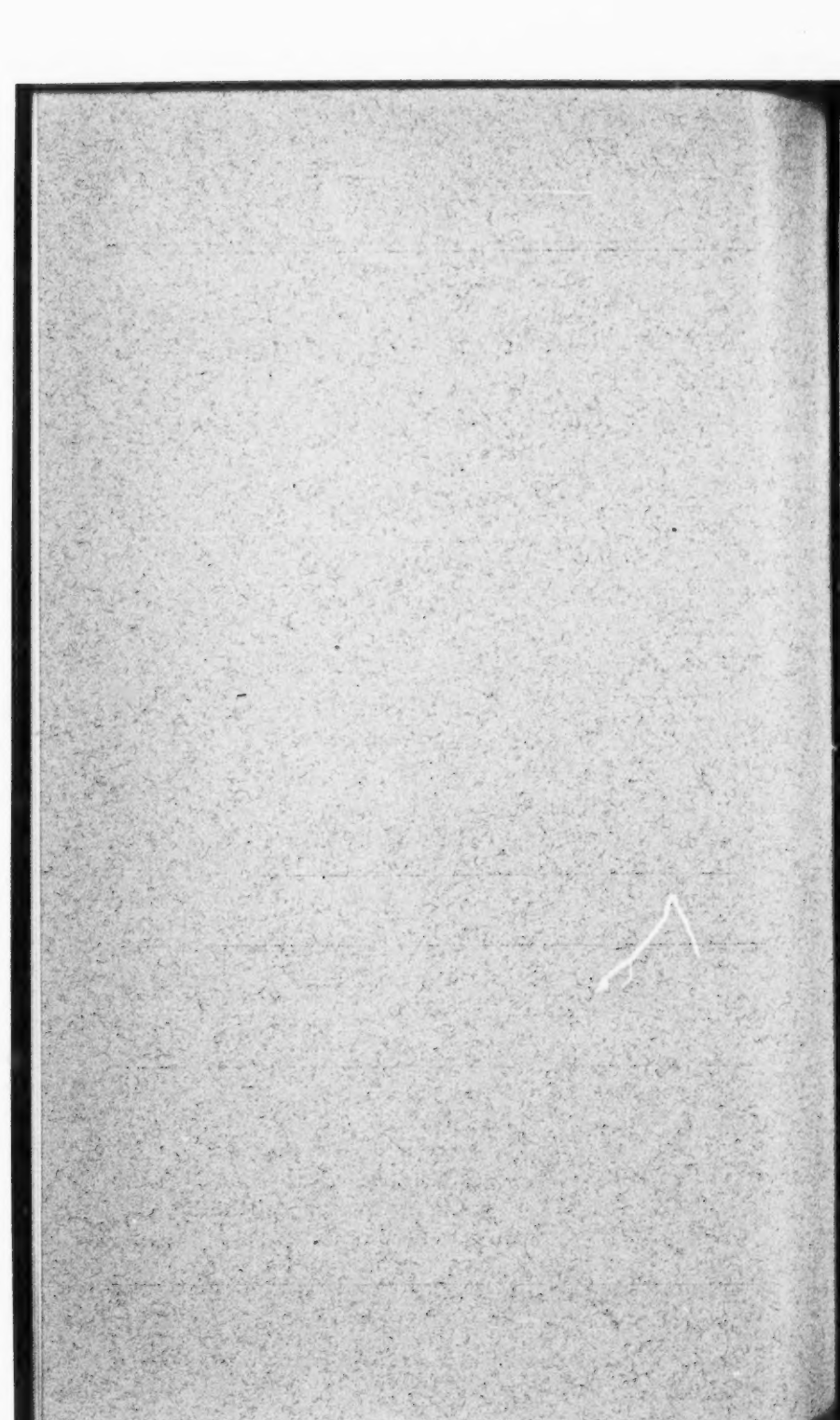
THE CUBA RAILROAD COMPANY,
Petitioner,

vs.

WALTER E. CROSBY,
Respondent.

Brief for Respondent Opposing Application for Writ of Certiorari

EDWIN L. KALISH,
SAMUEL KALISCH,
BENJAMIN M. WEINBERG,
Of Counsel for Respondent.



Supreme Court of the United States

OCTOBER TERM, 1909.

No. 585.

THE CUBA RAILROAD COMPANY,
Petitioner,

vs.

WALTER E. CROSBY,
Respondent.

BRIEF FOR RESPONDENT OPPOSING APPLICATION FOR WRIT OF CERTIORARI.

The petitioner is a New Jersey corporation, operating a railroad and maintaining car shops in the Republic of Cuba. The respondent is a citizen of the State of Tennessee, who was injured in Cuba, while in the employ of the petitioner. An action was brought in the United States Circuit Court for the District of New Jersey, for injuries occasioned by the alleged negligence of the defendant, and After a trial, the plaintiff was awarded a verdict for six thousand dollars. A rule to show cause was ob-

tained by the defendant below, why the verdict should not be set aside, and the action dismissed. After argument, before Judge Lanning, in the Circuit Court, the motion for a new trial was denied, and judgment for the plaintiff was entered on the verdict.

A writ of error was sued out by the defendant to the United States Circuit Court of Appeals for the Third Circuit, which handed down two opinions,—One, an affirmance of the Circuit Court, (Judges Dallas and Archbald concurring,) and the other a dissent, by Judge Gray.

The plaintiff in error now files its motion for a Writ of Certiorari to review the determination of the United States Circuit Court of Appeals, and bases the same chiefly upon the following grounds:

First—The question involved is of such general importance as to merit a review by the United States Supreme Court.

Second—Because there is a conflict between the decision of the Circuit Court of Appeals for the Third Circuit, and the decisions of other Federal Courts.

~~First~~ Third—The prevailing opinion of the Circuit Court of Appeals for the Third Circuit is not founded upon adequate authority for the principle enunciated by it in this case.

The question brought up for review is, whether it was necessary for the plaintiff to plead and prove what the laws of Cuba were, on the subject of actionable negligence, before he could recover in a case such as is stated in the pleadings,—it being admitted that a cause of action exists under the laws of this country where the parties, plaintiff and defendant, are both citizens.

The respondent respectfully submits that the Writ of Certiorari should not be issued for the following reasons:

First—The prevailing opinion of the Circuit Court of Appeals for the Third Circuit is based upon ample and comprehensive authority.

Second—There is no conflict between the prevailing opinion of the Circuit Court of Appeals for the Third Circuit and the decisions of any other Federal Courts on the same subject.

Third—There is nothing in the opinion of the minority Court out of which a different principle should be evolved.

Fourth—The question here involved is not of such general importance as to merit a review by this Court.

POINT 1.

THE PREVAILING OPINION OF THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT IS BASED UPON AMPLE AND COMPREHENSIVE AUTHORITY.

In the prevailing opinion written by Judge Archbald and concurred in by Judge Dallas, numerous authorities are cited which sustain the contention of the respondent that, "In the absence of proof of the foreign law, the law of the forum must furnish the rule of decision."

Wharton, in his conflict of laws, Sec. 778, p. 1531, lays down the rule as follows:

"Where there is no evidence as to the character of a foreign law, the courts will presume it to be

the same as the domestic law; in other words, in lack of such evidence, the courts will presume the law governing the case before them to be the same as the lex fori."

Jones on Evidence, 2nd Ed., Sec. 84, states the rule as follows:

"Where the rights of litigants are to be determined in this country, although those rights may be affected by proof of the law of a foreign country where the contract was made, or the right acquired, in the absence of any such proof the law of the forum must furnish the rule of decision."

Inasmuch as the opinion of the Third Circuit, cites at considerable length, the authorities which are in accord with the above rule, and which appear in the record in this case on pages 93 to 105 inclusive, it will be found unnecessary to re-state the same. It is true as the learned Judge, who wrote the prevailing opinion after reciting many cases, states that "these cases, taken at random from the reports, and by no means exhausting the list, conclusively show the law as it is administered in the State and in the English Courts, nor in the Federal Courts is a different rule in any respect applied." (Record pg. 101.) The Court then cites the cases in the United States Courts which are in accord with its decision, and also distinguishes all of the cases which it is said by the petitioner, are in conflict with it.

A short though succinct statement of the principle which the respondent contends for, is as follows: "A foreign law must be proved like any other fact, and in the absence of such proof, it will be presumed that the common law prevails in the foreign jurisdiction." 50 Mo. App., pg. 60.

To summarize, the opinion of the Third Circuit is

founded upon the following authoritative opinions, which are cited in the record:

Jones on Evidence, 2nd Ed. Sec. 84.

Wharton Conflict Laws, Sec. 1178 pg. 1531, 13 Amer. and Eng.

Enc. of Law, 2nd Ed. pg. 1060-1061.

9 *Enc. Pleading and Practice*, 543.

Monroe vs. *Douglass*, 5 N. Y. 447.

Linton vs. *Moorehead*, 209 Penn. 646.

Brown vs. *Gracey, Dow, and R. Y. N. P.* 41, 16 Eng. Com. Law 426 n.

Loyd vs. *Guibert*, L. R. 1 Q. B. 115, 129.

Scott vs. *Lord Seymour*, 1 H. & C. 219.

The "Halley" L. R. 2 P. C. 193.

Whitford vs. *Panama Railroad*, 23 N. Y. 465.

Savage vs. *O'Neil*, 44 N. Y. 298.

Hynes vs. *McDermott*, 82 N. Y. 41.

Mackey vs. *Mexican Central R. R.*, 78 N. Y. Supp. 966.

Pratt vs. *Roman Catholic Orph. Asy.*, 20 App. Div. 352 (46 N. Y. Supp. 1035) affirmed 166 N. Y. 593.

Sokel vs. *People*, 212 Ill. 238.

Carpenter vs. *Grand Trunk R. R.*, 72 Maine 388.

Woodrow vs. *O'Connor*, 28 Vt. 776.

McLeod vs. *Conn. R. R.*, 58 Vt. 727.

State vs. *Morrill*, 68 Vt. 60.

Louziza vs. *Superior Court*, 85 Cal. 11.

Wickersham vs. *Johnson*, 104 Cal. 407.

Chase vs. *Alliance Ins. Co.*, 9 Allen 311.

Aslamian vs. *Dostumian*, 174 Mass. 328.

Mittenthal vs. *Mascagni*, 183 Mass. 19.

Dainese vs. *Hale*, 91 U. S. 13 (23 Law Ed. 190).

The Scotland, 105 U. S. 24 (26 Law Ed. 1001).

Darison vs. *Gibson*, 56 Federal 443 (5 C. C. A. 543).

Mexican Cen. R. R. vs. *Marshall,* 91 Federal 933 (34 C. C. A. 133).

Mexican Cen. R. R. vs. *Glorer,* 107 Federal 356 (46 C. C. A. 334).

A case not cited in the opinion is that of the "Alpin," 23 Federal Rep., pg. 815, (District Court E. D. N. Y.). This case was founded on an action for damages to recover for the loss and damage to cargo, which resulted by reason of the steamship "A," while on a voyage from the Bahama Islands to New York, stranding on the coast of Maryland.

One of the points made, was that the libellants could not recover the damage resulting from the negligence of the captain, because liability arising from such negligence was excepted by the terms of the bill of lading, and that this exception was valid, according to the law of the place where the contracts were made. Judge Benedict said:

> "The answer to this position, sufficient for this case, is, that the *lex loci contractus* is neither pleaded nor proven; and the presumption is that it is the same as the law of the United States which is adverse to the validity of such an exemption in bills of lading."

All of the above cases bear directly upon the question here mooted, and are without a variant note.

The case of *Mackey* vs. *Mexican Cen. R. R.*, 78 N. Y. Supp., is squarely to the point. In that case, a resident of New York State brought suit against the defendant to recover damages for personal injuries received in Mexico, through the negligence of the defendant, a common carrier. It was held in that case, that is was not necessary to state the Mexican law in the complaint. The Court held

that if the law of Mexico denied the plaintiff the right to compensation, it would be for the defence to show that law, and that the Court would not presume the existence of a state of law in any country by which compensation for such injuries was not provided.

Justice Bradley in the cases of *Dainese* vs. *Hale*, 91 U. S., p. 13, (Supra), and *"The Scotland,"* 105 U. S., 30, (Supra), both of which decisions are set out at some length in Judge Archbald's opinion, (Record p. 102), has committed himself to the law thus:

> "The Courts of every country will administer justice according to its laws, unless a different law be shown to apply."

This principle is abundently sustained by the cases above cited, all of which are rather copiously referred to by Judge Archbald in his opinion.

One of the strongest statements of the law appears in the case of *Monroe* vs. *Douglass*, 5 N. Y., 447 (Supra), where it was said by the Court that, "It is a well-settled rule, founded on reason and authority, that the lex fori, or in other words, the laws of the country to whose Courts a party appeals for redress, furnish in all cases prima facie, the rule of decision; and if either party wishes the benefit of a different rule or law, * * * he must aver and prove it."

The petitioner in its brief has devoted much space to a classification of the cases cited by Judge Archbald, but nowhere shows that, even though the various decisions arose out of causes involving many and diverse interests, any conflict whatsoever exists between them; but on the contrary shows, that, notwithstanding the questions involved, arose within the various States, or between the citizens

of the various States and those of foreign countries, or where foreign contracts were interpreted, or title to real estate was concerned, or in cases involving torts similar to the case in hand, or dicta in other classes of cases, they all uniformly adopted the rule followed by the Court below, "That in the absence of proof of the law of a foreign country, the law of the forum must furnish the rule of decision."

It will therefore be seen from the foregoing, that the prevailing opinion of the Circuit Court of Appeals for the Third Circuit, is based upon ample and comprehensive authority.

POINT 2.

THERE IS NO CONFLICT BETWEEN THE PREVAILING OPINION OF THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND THE DECISION OF ANY OTHER FEDERAL COURT, ON THE SAME SUBJECT.

The petitioner insists that certain decisions in the Federal Courts are in conflict with the opinion rendered in this case by the Circuit Court of Appeals for the Third Circuit, and cites the following as bearing out its contention:

Slater vs. *Mexican Central R. R. Co.*, 194 U. S., 120.

Mexican Central R. R. Co. vs. *Eckman*, 205 U. S., 538.

Chouquette vs. *Mexican Central R. R. Co.*, 156 Fed., 1022.

Crashley vs. *Press Publishing Co.*, 179 N. Y., 27.

All of these cases were considered by the majority of the Court, and were either found to agree

with the principle laid down by it, or else were cases in which the same principle was not involved.

For the sake of convenience, I extract from the opinion of Judge Archbald, the following comments:

As to the case of *Slater* vs. *Mexican National R. R.* (Supra), the Court said, (beginning line 5 of Record, p. 94):

> "The (this) cause of action is not one unknown to the Common Law, and so dependent upon statute, as in the case of negligence causing death. Neither is it, as in *Slater* vs. *Mexican National R. R.*, 194 U. S. 180 (Supra), expressly brought to enforce the liability of that character, arising abroad, the foreign statute—that of Mexico—being declared on and approved, and the damages by way of annuity or pension thereby given, being sued for, and claimed."

And further on p. 103 of the Record, the Court said:

> "There is nothing counter to this doctrine in *Slater* vs. *Mexican National R. R.* 194 U. S., 120, upon which much reliance is placed. The action there was to recover for the death of an employee, a switchman, who was killed in Mexico, by the negligence of the defendant company, operating there. The right to recover was based on the Mexican law, which was set out and proved, as it had to be, there being no right of action otherwise. The compensation provided by that law, where death has been wrongfully caused, looks to the support of the dependent family by periodical payments, enforced by a decree analogous, as it is said, to a decree for alimony, and subject to modification from time to time, as circumstances vary. This

measures the liability and inheres in and gives character to the relief given by that law, and the courts of this country having no means for entering or enforcing a judgment of that kind, it was held that an action here could not be sustained. That is the whole of the decision, and if it is kept in mind, no confusion can arise over what is said or what it stands for. In no respect was the question involved, which is here mooted, whether on proof of a case otherwise good by the law as it is apprehended in this country, the plaintiff is entitled to recover, or is to be nonsuited, on its being shown that it arose abroad, if the foreign law is not proved in the same connection. What is said in the case is to be construed in the light of what was decided; not what was decided by what was said."

It might be added in the above case, that the gist of what the Court said and decided, is found in the concluding lines of the extract from the opinion as cited by the petitioner in his brief, commencing top of page 10, as follows:

> *"It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose."*

In this, as in all other cases which the petitioner cites, and which arose in the State of Mexico, the plaintiffs sought to avail themselves of some statute law in Mexico, and came into Court affirmatively depending upon the Mexican statute for relief; they were held in those cases bound by the foreign law, although in the Slater case, on the question involved, there was a dissenting opinion by the learned Chief Justice.

The case of *Mexican Central R. R. Co.* vs. *Eck-*

man, 205 U. S., 536, (Supra), the Court distinguished as follows:

> "Neither is there anything which touches the question, in *Mexican Central R. R.* vs. *Eckman*, 205 U. S. 536, which was ruled on the strength of the Slater case; the question there certified and passed upon being simply whether the plaintiff, who had been injured while in defendant's service in Mexico, could recover without regard to the laws of that country, those laws having been put in evidence and proved, and showing the same character of liability discussed in the Slater case. Nor is the Court of Appeals of the Fifth Circuit to be regarded as having laid down any different rule.

As to *Mexican Central R. R.* vs. *Chantry*, 136 Fed., 316, (Record p. 104), the Court said:

> "Nor is the case of *Mexican Central Railroad* vs. *Chantry*, 136 Fed. 316, in the same court, at variance with this. There, as in the others, the action was for personal injuries suffered by the plaintiff while employed by the defendant company as a railroad conductor in Mexico. But, differing from the others, the laws of that country were pleaded and proved, both these which gave the plaintiff a right of action, and those set up by the defendant, by which it was sought to be established in bar, that, by legal proceedings had in Mexico, it had been decided that there was no liability by reason of the accident, and that the plaintiff had thus no cause of action. It was with a case of that character that the court had to deal, and to it whatever was said was necessarily addressed. There is nothing as we view it which bears, one way or the other, on that which is involved here. But if there is, it is to be taken with the facts of the case in mind. It cannot be assumed, that there was any intention of qualifying the law, as it had been laid down by the same court in the cases which had gone before,

where the question here in issue came squarely up and was decided."

As to *Crashley* vs. *Press Publishing Co.*, 179 N. Y., 127, (Supra) the Court expressed itself as follows:

"Nor is there anything at variance with this in *Crashley* vs. *Press Publishing Company*, 179 N. Y., 127, relied on by defendant's counsel. If it stood for what it is so cited, it would run counter to the current of the cases in that state, which have been referred to. But the fact is it does not. The action there was libel, for the publication in the New York World of an article reflecting on the conduct of the plaintiff with regard to certain happenings while he was a resident of Rio Janeiro, Brazil, the libellous charge is substance being that the plaintiff was engaged in a conspiracy to bring about a revolution in that country; the publication of the article having caused his arrest by the police of Rio Janeiro, and his being put in jail there for several days. The complaint was dismissed at the trial and this was affirmed on appeal, it being held that no libel was shown, the article not being libellous *per se*, and there being nothing to show that by the law of Brazil the plaintiff was charged with crime. The ground of this decision, if carefully observed, will remove all question as to its purport. The article not otherwise reflecting on the plaintiff, it had somehow to appear that by the laws of the land where the occurrence with which he was said to have been connected took place, an offense was committed which made him amenable therein, which could only be shown by proof of what those laws were, as to which no presumption could be indulged; the frequent revolutions in South American countries, as it is somewhat gratuitously suggested, not warranting the interference that the fermenting of them was derogatory to him. This goes a good ways. But,

however that may be, the mistake made is in identifying this in principle with a case where, independent of local law, and however it may be qualified thereby when it is shown, the plaintiff has a good case on its face and does not have to invoke the local law to make it out."

The case of *Chouquette* vs. *Mexican Central R. R. Co.*, 156 Fed, 1022, (Supra), was decided by the Circuit Court of Appeals for the Fifth Circuit, at the same time that the Eckman case was decided and involved the same question as was certified in that case. It might be well to state just what was certified to the Supreme Court, by the United States Circuit Court of Appeals for the Fifth Circuit in the Eckman case. The question and answer as they appear in 205 U. S., 538, are as follows:

"In an action brought in the U. S. Circuit Court in and for the Western District of Texas, by a citizen of that District, against the Mexican Cent. Ry. Co., a corporation duly created under the laws of the State of Massachusetts and doing business in, and operating a steam railroad under continuous line in the State of Texas, and the Republic of Mexico, to recover for injuries to the plaintiff received while he was engaged in defendant's service, and whereby through defective appliance furnished by said railroad company, and the negligent operation of the said railroad in the Republic of Mexico, the said plaintiff at Ebano, Mexico, was injured and lost a leg. Can the Court proceed to judgment and award such damages as upon proof may be assessed by a jury, *notwithstanding the provisions of the laws of the Republic of Mexico proved on this trial*, and recited in the statement of this case, and which it is agreed, were the laws of Mexico applicable herein, in force and effect at the time of the injuries complained of?"

This question was answered by the Court in a per curiam as follows:

> "Questions answered in the negative on the authority of *Slater* vs. *Mexican Nat. Ry. Co.*, 194 U. S. p. 120."

It must therefore be clear that decisions, growing out of matters founded on, and applying to cases where the plaintiff voluntarily and affirmatively relies upon the statute of a foreign country for his remedy, (not having that particular remedy in the forum), are entirely different from cases like the one in hand, and the numerous other cases cited, where the plaintiffs brought suit in the forum relying solely upon the relief granted by the laws of the forum, without knowing what the foreign laws were, but depending for relief upon the broad principles of right, justice and humanity. It therefore, cannot be said in any seriousness, that a conflict upon the same subject matter, has been shown by the cases cited by the petitioner.

POINT 3.

THERE IS NOTHING IN THE OPINION OF THE MINORITY COURT OUT OF WHICH A DIFFERENT PRINCIPLE SHOULD BE EVOLVED.

In his dissenting opinion, the learned Judge Gray, at one place remarks as follows: "It would indeed be a hard rule that would compel the defendant, by affirmative plea and testimony, to assume the burden of proving the negative, by showing that there was no law justifying the action in Cuba." The learned Judge fails to point out, however, wherein the hardship or the injustice lies. It

is quite logical, and more consistent with right and justice, that the defendant who is charged with the commission of an offence punishable by the laws of the forum, should be called to prove that his act was an innocent one, or one that is not punishable, than to expect the plaintiff, to prove a double right of recovery, viz., that he has first, a right of recovery under the laws of the forum—for this he must do in the first instance,—and secondly that he has a right of recovery under the laws of the country where the wrong was alleged to have taken place, and where perhaps no affirmative right of recovery can be shown, either because of lack of statute, code or precedent:

To assert that it is the duty of the plaintiff to plead and prove his right of recovery under the law of a foreign country, if there be any upon the subject, will be asking him to resort to the practice of *finding a law before he can assert a right, instead of asserting a right and compelling the law to find a remedy to enforce that right*, or to re-state the proposition, the plaintiff, no matter how apparent his right of recovery may be in the forum, will be denied that recovery unless he can find some law in the foreign country, no matter how uncivilized the country, or crude its laws may be, upon which that right can be based or asserted; and when we take the situation of two litigants both citizens of, and acquainted with the law of the forum litigating over a cause of action admitted to exist in the forum, and yet compel the one asserting that right, to prove affirmatively a corresponding right existing in a foreign country (particularly if that country be an uncivilized one) where the parties happened to be at the time the alleged wrong occurred, the inaccuracy of this reasoning must become apparent.

This feature is commented upon by Judge Archbald, who wrote the prevailing opinion, and to which I respectfully refer.

Judge Gray, in his opinion further states that, "It will be presumed in the absence of proof to the contrary, that, in countries where the common law of England prevails, the Lex Loci is the same as the Lex Fori. Such a presumption, however, takes the place of proof, is a kind of proof and is founded upon known probabilities, and is very unlike a legal fiction which exists independently of all probability, and even of all known facts." Why should it be presumed that the law of a foreign country other than one where the common law of England prevails, is more opposed to the administration of justice than that of a country where the common law prevails? Justice may, and ought to be administered, and is administered in countries that have not been settled by English colonists alone. Natural justice needs no code, statute, custom or precedent to follow, and we have a right to assume that natural justice prevails in Cuba, even thought it was one of the Spanish possessions, and takes her law from the Mother Country. And if the laws of a foreign country should be so harsh as to deny a right of recovery in matters recognized as fundamental, natural rights, it would not be followed in the law of the forum as being opposed to public policy. Judge Gray recognizes this and states that "While it is very likely that harmful negligence is held to be culpable wherever legal wrongs are redressed, it is very unlikely that the law in respect to torts, in States governed by the civil code, coincides with, and is without variance from that where the common law prevails. Presumptions are resorted to for convenience in the administration of law, and in any case, and for any purpose it is only the probable and

never the improbable which the law ventures to assume." Can it be possible that the learned Judge means to assert, that it is improbable that a servant injured through the carelessness of the master in a country other than one which has adopted the common law, is entitled to a recovery, for no other reason than the country is not a common law one? If it is the probable which is indulged in, is it not illogical to assume that what is recognized as a serious invasion of one's rights in this country, is not such in another civilized country? Why should the barrier be raised between a common-law and a civil-law country on questions which involve natural justice and humane conduct?

It must be presumed, there being on the record nothing to the contrary, that Cuba is a civilized country, and that the culpable negligence set out in the plaintiff's declaration and established by proof, is a recognized ground of action in Cuba.

If it truly appeared by the defendants' plea, that under the law of Cuba the facts set out in the plaintiff's declaration, did not constitute actionable negligence in Cuba a different question would have been presented to the Court, viz., whether such a defence, which is contrary to natural justice, the policy of our law, and the instincts of humanity, would be recognized.

The petitioner states in its brief that, "The Spanish American countries derive their law from the Roman Law, and it is contained in Statutory Codes; consequently any liability which may arise from the defendant's acts, must, if it arises at all, derive its force from some statute." (Pg. 4 Petitioner's brief.) If this is taken as an accurate statement of the law, then no matter how vicious the act of the defendant might be, the plaintiff

would have no remedy whatsoever in the forum,—which is not the policy of the law in this country,—for it has been clearly held, that if the law of the country, or the State in which the injury occurred, is against the public policy of the State in which the action is brought, that law will not be followed.

Scott vs. *Seymour*, 1 H. & C., p. 219.

Morisette vs. *Can. Pac. Ry Co.*, 56 Atl., p. 1102.

Walsh vs. *N. Y. & N. E. Ry.*, 36 N. E., p. 584.

Besides this, the petitioner's statement, if true, would compel every plaintiff injured in a foreign country to refrain from bringing any action whatsoever to redress his wrongs, no matter how meritorious his claim might be under the law of the forum, unless he could find a remedy prescribed for him in such code or statute; and if through ignorance, corruption or inhumanity, no law existed in the foreign country which would afford a remedy for culpable negligence, the plaintiff would be remediless. Such a doctrine would be too dangerous, and inhuman to even think of, and is, moreover, without any authority in law, whatsoever.

POINT 4.

THE QUESTION HERE INVOLVED, IS NOT OF SUCH GENERAL IMPORTANCE AS TO MERIT A REVIEW BY THIS COURT.

It is respectfully submitted by the respondent, that the entire controversy now before this Court, arises purely out of a matter of pleading and therefore does not necessarily involve any question of principle.

The contention on the part of the defendant, is not that the acts of the defendant charged against it in the plaintiff's declaration do not constitute an actionable tort in Cuba, but the insistence is, that the plaintiff must show affirmatively that there is some law in Cuba which makes such acts an actionable wrong. This, as has been stated, simply involves the question of pleading.

It is plain that if there is no law in Cuba which provides for a recovery in a case such as is stated in the plaintiff's declaration, then it was purely a matter of defence, and by the well recognized rules of pleading, should have been pleaded in bar to the plaintiff's action. This would have driven the plaintiff to a demurrer to the defendant's plea, and the question would then have come squarely before the court on such pleadings; or the same result could have been attained, if the defendant had filed a demurrer to the plaintiff's declaration alleging no cause of action shown by the plaintiff, such as to confer jurisdiction upon the Court. Or the question might have been raised by a motion to strike out the declaration on the same grounds. So that the hardship, said to have been imposed upon the petitioner, the defendant below, has been brought upon itself by its own acts. It may be suggested that it is somewhat strange that while the defendant was taking depositions in Cuba, as the record shows, it did not deem it worth the while to take depositions to show that the law of Cuba did not permit a recovery in a case as stated in the plaintiff's declaration, if such was the state of the law in Cuba. On the contrary, it is fairly inferable from the acts of the defendant, that the law of Cuba on the subject of negligence, is similar to our own.

If, however, it is not the same, the petitioner, as pointed out above, should have pleaded that fact,

and the question would then have been settled completely by the trial court.

If the petitioner has, through error or omission, pleaded improperly, it cannot now come before this honorable court, and ask it to correct, or relieve against, such error or omission.

For all of which reasons it is respectfully submitted that a Writ of Certiorari should not be issued, in this case, to the Circuit Court of Appeals for the Third Circuit.

EDWIN L. KALISH,
SAMUEL KALISH,
BENJAMIN M. WEINBERG,
Of Counsel for Respondent.

CUBA RAILROAD COMPANY *v.* CROSBY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 124. Argued December 18, 1911.—Decided January 9, 1912.

In dealing with rudimentary contracts, or torts made or committed abroad, courts may assume a liability to exist if nothing to the contrary appears, but they cannot assume that the rights and liabilities are fixed and measured in the same manner in foreign countries as they are in this.

With rare exceptions, the liabilities of parties to each other are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it.

The extension of hospitality of our courts to foreign suitors must not be made a cover for injustice to defendants of whom they may be able to lay hold.

There is no general presumption that the law of Cuba as inherited from Spain and as since modified is the same as the common law.

While as between two common-law countries the common law may be presumed to be the same in one as in the other, a statute of one would not be presumed to be the statute of the other.

A trial court of the United States cannot presume that the same obligation rests upon an employer in Cuba as in this country to repair defects in machinery called to his attention, or in case of failure to repair to be deprived of the fellow-servants defense. Such a rule of law, if existent in a foreign jurisdiction, must be proved.

170 Fed. Rep. 369; 95 C. C. A. 539, reversed.

THE facts are stated in the opinion.

Mr. Howard Mansfield for petitioner:

The courts of the United States should not take cognizance of an alleged cause of action for a foreign tort where the rights of the parties under the foreign law cannot be certainly and definitely ascertained, and where

the foreign tribunal is equally available to both parties. *Slater* v. *Mexican National R. R. Co.*, 194 U. S. 120, 129.

The rule is that the *lex loci delicti* determines whether or not there is a cause of action. *Machado* v. *Fontes* (1897), L. R. 2 Q. B. 231; *Phillips* v. *Eyre* (1876), L. R. 6 Q. B. 1; *Coyne* v. *Southern Pac. Co.* (1907), 155 Fed. Rep. 683; Minor's Conflict of Laws, § 202; Dicey on the Conflict of Laws; Moore's Notes, 659, 667; Cooley on Torts, 3d ed., 900; *Mexican Central Ry. Co.* v. *Chantry*, 136 Fed. Rep. 316; *Mexican Cent. Ry. Co.* v. *Eckman*, 205 U. S. 538.

The last two cases dispose of the *dictum* in *Scott* v. *Lord Seymour*, 1 H. & C. 219, relied on by the Circuit Court, and by the majority of the Circuit Court of Appeals.

Federal courts will not take cognizance of a common tort which arose in a civil law jurisdiction, unless the acts complained of gave rise to an obligation in the jurisdiction where the alleged cause of action arose.

There can be no presumption that the common law extends to Cuba.

In the case of a country not settled by England or English colonists there is no presumption that the common law prevails there or that rights given by the common law exist in such country; and our courts must take judicial notice that Cuba was not settled by England or her colonists, but that it formed part of the Spanish possessions and that the civil law obtains there, and that that law is wholly statutory. *Davison* v. *Gibson*, 56 Fed. Rep. 443; *Savage* v. *O'Neil*, 44 N. Y. 298; *Islanian* v. *Dostumian*, 174 Massachusetts, 328; *Mex. Cent. Ry. Co., Ltd.*, v. *Chantry*, 136 Fed. Rep. 316.

There can be no presumption, nor any ruling in the absence of pleading or proof, that the act alleged gave rise to a cause of action in the foreign country. *Evey* v. *Mexican Cent. R. R. Co.*, 81 Fed. Rep. 294; *Slater* v. *Mexican Natl. R. R. Co.*, 194 U. S. 120; *Stewart* v. *Baltimore &*

Ohio R. R. Co., 168 U. S. 445; *Atchison &c. Ry. Co.* v. *Sowers*, 213 U. S. 55; *Am. Banana Co.* v. *United Fruit Co.*, 213 U. S. 347; *Goodyear Tire & Rubber Co.* v. *Rubber Tire Wheel Co.* (1908), 164 Fed. Rep. 869; *Farrell* v. *Farrell*, 142 App. Div. 605; *McLeod* v. *Railroad Company*, 58 Vermont, 727.

The plaintiff Crosby, having alleged a transitory action arising in a civil law country, but failing to plead or prove that the acts complained of gave rise to any *obligatio*, the judgments below were clearly erroneous. *Mexican Cent. R. R. Co.* v. *Eckman*, 205 U. S. 538; 156 Fed. Rep. 1023; *Chouquette* v. *Mexican Cent. R. R. Co.*, 156 Fed. Rep. 1022; *Slater* v. *Mex. Natl. R. R. Co.*, 194 U. S. 120.

Where the act complained of happened in a foreign jurisdiction and a right of action is alleged to have arisen therefrom, the law of the forum and the remedy of the forum must in some degree resemble the law of the wrong and its remedy. *Northern Pacific R. R. Co.* v. *Babcock*, 154 U. S. 190; *Herrick* v. *Minn. & St. L. Ry. Co.*, 31 Minnesota, 11; *Parrot* v. *Mexican Central Ry. Co.*, 207 Massachusetts, 184; Story on Conflict of Laws, 7th ed., § 637.

The precise presumptions requisite to sustain the judgments below have no proper legal basis. *Andrecsik* v. *N. J. Tube Co.*, 73 N. J. Law, 664; *District of Columbia* v. *McElligott*, 117 U. S. 621.

The rule applied by the courts below that the plaintiff was relieved from the assumption of risk of injury due to the defective machinery after he had noticed the defect and received from the superintendent a promise to remedy the defect, is not applicable, since that rule can properly be applied only to cases where the servant is *necessarily* exposed to the dangers of that particular machinery. *Roccia* v. *Black Diamond Mining Co.*, 121 Fed. Rep. 451 (1903); *Showalter* v. *Fairbanks Co.*, 60 N. W. Rep. 257; *Cincinnati &c.* v. *Robertson*, 139 Fed. Rep. 519; *Crookston Lumber Co.* v. *Boutin*, 149 Fed. Rep. 680; *Cooperage Co.* v. *Headrick*, 159 Fed. Rep. 680.

Mr. Benjamin M. Weinberg, with whom *Mr. Edwin L. Kalish* was on the brief, for respondent:

If the law of the State or country in which the injury occurred is opposed to the public policy of the State or country in which the action is brought, that law will not be followed. *Scott* v. *Seymour*, 1 H. & C. 219; *Morisette* v. *Can. Pac. Ry. Co.*, 76 Vermont, 267; *Walsh* v. *N. Y. & N. E. Ry. Co.*, 160 Massachusetts, 571; *Whitford* v. *Panama R. R. Co.*, 25 N. Y. 465.

It was immaterial that the plaintiff failed to prove his right of recovery under the Cuban law, as the court will presume, until otherwise proven, that the law of the place where the injury was inflicted, if such injury is predicated on the invasion of a generally known right, is the same as that prevailing in the trial forum. Jones on Evidence, 2d ed., § 84; Whart. Conflict Laws, §§ 778, 1531; 13 Am. & Eng. Enc. Law, 2d ed. 1060; 9 Enc. Pl. and Pr. 543; *Monroe* v. *Douglass*, 5 N. Y. 447; *Lloyd* v. *Guibert*, L. R. 1 Q. B. 113, 129; *Savage* v. *O'Neil*, 44 N. Y. 298; *Sokel* v. *People*, 212 Illinois, 238; *The Scotland*, 105 U. S. 24. See also *Brown* v. *Gracey*, Dow. and Ry. N. P. 41; 16 Eng. Com. Law, 462*n.*; *Linton* v. *Moorehead*, 209 Pa. St. 646; *Scott* v. *Lord Seymour*, 1 H. & C. 219; *The Halley*, L. R. 2 P. C. 193; *Whitford* v. *Panama R. R. Co.*, 25 N. Y. 465; *Hynes* v. *McDermott*, 82 N. Y. 41; *Mackey* v. *Mexican Central R. R. Co.*, 78 N. Y. Supp. 966; *Pratt* v. *Roman Catholic Orph. Asy.*, 20 App. Div. 352; *S. C.*, affirmed, 166 N. Y. 592; *Carpenter* v. *Grand Trunk R. R. Co.*, 72 Maine, 388; *Woodrow* v. *O'Connor*, 28 Vermont, 776; *McLeod* v. *Conn. R. R. Co.*, 58 Vermont, 727; *State* v. *Morrill*, 68 Vermont, 60; *Loaziza* v. *Superior Court*, 85 California, 11; *Wickersham* v. *Johnson*, 104 California, 407; *Chase* v. *Alliance Ins. Co.*, 9 Allen, 311; *Aslanian* v. *Dostumian*, 174 Massachusetts, 328; *Mittenhal* v. *Mascagni*, 183 Massachusetts, 19; *Dainese* v. *Hale*, 91 U. S. 13; *Davison* v. *Gibson*, 56 Fed. Rep. 443; *Mexican Cent. R. R. Co.*

v. *Marshall*, 91 Fed. Rep. 933; *Mexican Cent. R. R. Co.* v. *Glover*, 107 Fed. Rep. 365.

In the absence of proof to the contrary and until the foreign law has been actually shown, the law of the land is to be applied. Dicey, Conflict of Laws, 2d ed. (1908), 39; *The M. Moxham*, 1 P. D. 107; *The Halley*, L. R. 2 P. C. 193; *Philips* v. *Eyre*, 4 L. R. Q. B. 225; 6 L. R. Q. B. 1 (1869); *Machado* v. *Fontes*, 2 L. R. Q. B. 542 (1897), also cited as 2 Q. B. (C. A.) 231–233 (1897); *Parrot* v. *Mexican Cent. R. R. Co.*, 207 Massachusetts, 184.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action for the loss of a hand through a defect in machinery, in connection with which the defendant in error, the plaintiff, was employed. The plaintiff had noticed the defect and reported it, and, according to his testimony, had been promised that it should be repaired or replaced as soon as they had time, and he had been told to go on in the meanwhile. The jury was instructed that if that was what took place the defendant company assumed the risk for a reasonable time, and, in effect, that if that time had not expired the plaintiff was entitled to recover. The jury found for the plaintiff. The accident took place in Cuba, and no evidence was given as to the Cuban law, but the judge held that if that law was different from the *lex fori* it was for the defendant to allege and prove it, and that as it had pleaded only the general issue the verdict must stand. 158 Fed. Rep. 144. The judgment was affirmed by a majority of the Circuit Court of Appeals. 170 Fed. Rep. 369. 95 C. C. A. 539.

The court below went on the ground that in the absence of evidence to the contrary it would "apply the law as it conceives it to be, according to its idea of right and justice; or, in other words, according to the law of the forum." We regard this statement as too broad, and as having been wrongly applied to this case.

It may be that in dealing with rudimentary contracts or torts made or committed abroad, such as promises to pay money for goods or services, or battery of the person or conversion of goods, courts would assume a liability to exist if nothing to the contrary appeared. *Parrot* v. *Mexican Central Railway Co.*, 207 Massachusetts, 184. Such matters are likely to impose an obligation in all civilized countries. But when an action is brought upon a cause arising outside of the jurisdiction it always should be borne in mind that the duty of the court is not to administer its notion of justice but to enforce an obligation that has been created by a different law. *Slater* v. *Mexican National R. R. Co.*, 194 U. S. 120, 126. The law of the forum is material only as setting a limit of policy beyond which such obligations will not be enforced there. With very rare exceptions the liabilities of parties to each other are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it. *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 356. See *Bean* v. *Morris*, 221 U. S. 485, 486, 487. That and that alone is the foundation of their rights.

The language of Mr. Justice Bradley in *The Scotland*, 105 U. S. 24, with regard to the application of the *lex fori* to a case of collision between vessels belonging to different nations and so subject to no common law, referred to that class of cases and no others, and was used only in coming to the conclusion that foreign vessels might take advantage of our Limited Liability Act. See also *The Chattahoochee*, 173 U. S. 540, 550. Other exceptional cases are referred to in *American Banana Co.* v. *United Fruit Co.*, *ubi supra*, such as those arising in regions having no law that civilized countries would recognize as adequate. But as to causes of action arising in a civilized country the disregard of the foreign law occasionally indicated by some English judges before the theory to be applied was quite worked out must be disregarded in its turn. The

principle adopted by the decisions of this court is clear. See also Dicey, Confl. of Laws, 2d ed., 647 *et seq.*

We repeat that the only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well founded belief that it was a cause of action in that place. The right to recover stands upon that as its necessary foundation. It is part of the plaintiff's case, and if there is reason for doubt he must allege and prove it. The extension of the hospitality of our courts to foreign suitors must not be made a cover for injustice to the defendants of whom they happen to be able to lay hold.

In the case at bar the court was dealing with the law of Cuba, a country inheriting the law of Spain and, we may presume, continuing it with such modifications as later years may have brought. There is no general presumption that that law is the same as the common law. We properly may say that we all know the fact to be otherwise. *Goodyear Tire & Rubber Co.* v. *Rubber Tire Wheel Co.*, 164 Fed. Rep. 869. Whatever presumption there is is purely one of fact, that may be corrected by proof. Therefore the presumption should be limited to cases in which it reasonably may be believed to express the fact. Generally speaking, as between two common law countries, the common law of one reasonably may be presumed to be what it is decided to be in the other, in a case tried in the latter state. But a statute of one would not be presumed to correspond to a statute in the other, and when we leave common law territory for that where a different system prevails obviously the limits must be narrower still. *Savage* v. *O'Neil*, 44 N. Y. 298. *Crashley* v. *Press Publishing Co.*, 179 N. Y. 27, 32, 33. *Aslanian* v. *Dostumian*, 174 Massachusetts, 328, 331.

Even if we should presume that an employé could recover in Cuba if injured by machinery left defective through the negligence of his employer's servants, which

would be going far, that would not be enough. The plaintiff recovered, or, under the instructions stated at the beginning of this decision, at least may have recovered, notwithstanding his knowledge and appreciation of the danger, on the strength of a doctrine the peculiarity and difficulties of which are elaborately displayed in the treatise of Mr. Labatt. 1 Labatt, Master & Servant, ch. 22, esp. § 424. To say that a promise to repair or replace throws the risk on the master until the time for performance has gone by, or that it does away with or leaves to the jury what otherwise would be negligence as matter of law is evidence of the great consideration with which workmen are treated here, but cannot be deemed a necessary incident of all civilized codes. It could not be assumed without proof that the defendant was subject to such a rule.

There was some suggestion below that there would be hardship in requiring the plaintiff to prove his case. But it should be remembered that parties do not enter into civil relations in foreign jurisdictions in reliance upon our courts. They could not complain if our courts refused to meddle with their affairs and remitted them to the place that established and would enforce their rights. A discretion is asserted in some cases even when the policy of our law is not opposed to the claim. *The Maggie Hammond*, 9 Wall. 435. The only just ground for complaint would be if their rights and liabilities, when enforced by our courts, should be measured by a different rule from that under which the parties dealt.

Judgment reversed.